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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92046185
Party	Plaintiff Amanda Blackhorse, Marcus Briggs, Phillip Gover, Shquanebin Lone-Bentley, Jillian Pappan, and Courtney Tsotigh
Correspondence Address	JESSE WITTEN DRINKER BIDDLE AND REATH LLP 1500 K STREET NW, SUITE 1100 WASHINGTON, DC 20005-1209 UNITED STATES Jesse.Witten@dbr.com, John.Ferman@dbr.com, Lee.Roach@dbr.com, Stephen.Wallace@dbr.com
Submission	Other Motions/Papers
Filer's Name	Jesse A. Witten
Filer's e-mail	Jesse.Witten@dbr.com, dctrademarks@dbr.com, Jennifer.Criss@dbr.com
Signature	/Jesse A. Witten/
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Attachments	Part 42 of 60 BLA-TTAB-04124 - 04387.pdf (266 pages)(7612976 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Registration No. 1,606,810 (REDSKINETTES)
Registered July 17, 1990,

Registration No. 1,085,092 (REDSKINS)
Registered February 7, 1978,

Registration No. 987,127 (THE REDSKINS & DESIGN)
Registered June 25, 1974,

Registration No. 986,668 (WASHINGTON REDSKINS & DESIGN)
Registered June 18, 1974,

Registration No. 978,824 (WASHINGTON REDSKINS)
Registered February 12, 1974,

and Registration No. 836,122 (THE REDSKINS—STYLIZED LETTERS)
Registered September 26, 1967

)	
Amanda Blackhorse, Marcus Briggs,)	
Phillip Gover, Jillian Papan, and)	
Courtney Tsotigh,)	
)	
Petitioners,)	
)	
v.)	Cancellation No. 92/046,185
)	
Pro-Football, Inc.,)	
)	
)	
Registrant.)	
)	

ATTACHMENT TO PETITIONERS' FIRST NOTICE OF RELIANCE

PART 42 OF 60

BLA-TTAB-04124 – BLA-TTAB-04387

Respectfully Submitted,

/s/Jesse A. Witten
Jesse A. Witten
Jeffrey J. Lopez
John D. V. Ferman
Lee Roach
Stephen J. Wallace
DRINKER, BIDDLE & REATH, LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005
Telephone: (202) 842-8800
Fax: (202) 842-8465
Jesse.Witten@dbr.com
Jeffrey.Lopez@dbr.com
John.Ferman@dbr.com
Lee.Roach@dbr.com
Stephen.Wallace@dbr.com

Counsel for Petitioners

GN 3: Nunberg
2/19/97

1 UNITED STATES PATENT AND TRADE MARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
3 NORTHERN DISTRICT OF CALIFORNIA

4 ---ooo---

5 SUZAN SHOWN HARJO, RAYMOND D.)
6 APODACA, VINE DELORIA, JR.,)
7 NORBERT S. HILL, JR., MATEO)
8 ROMERO, WILLIAM A. MEANS,)
9 ET AL.,)

CERTIFIED COPY

10 PETITIONERS,)

11 VS.)

No. 21.069

12 PRO-FOOTBALL, INC.,)

13 RESPONDENT.)
14 -----)

15 DEPOSITION OF
16 GEOFFREY NUNBERG

17 -----
18 WEDNESDAY, FEBRUARY 19, 1997
19 VOLUME III

20 REPORTED BY: KARLA SHALLENBERGER, CSR NO. 10752

21 MARY HILLABRAND, INC., (415) 255-1994

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I N D E X

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1 DEPOSITION OF GEOFFREY NUNBERG

2

3 BE IT REMEMBERED that pursuant to Notice

4 of Taking Deposition, and on Wednesday, February

5 19, 1997, commencing at the hour of 9:25 thereof,

6 at the Law Offices of MORRISON & FOERSTER before

7 me, KARLA SHALLENBERGER, a Certified Shorthand

8 Reporter in the State of California, there

9 personally appeared

10 GEOFFREY NUNBERG,

11 called as witness, who being by me first duly

12 sworn, was thereafter examined and testified as

13 hereinafter set forth.

14 ---oOo---

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A P P E A R A N C E S

DORSEY & WHITNEY LLP, Pillsbury Center
South, 220 South Sixth Street, Suite 1300,
Minneapolis, Minnesota 55402, represented by
MICHAEL LINDSAY, Attorney at Law, appeared as
counsel on behalf of Petitioners.

WHITE & CASE, 1155 Avenue of the
Americas, New York, New York 10036, represented by
JOHN PAUL REINER, Attorney at Law, appeared as
counsel on behalf of Respondents.

---oOo---

1 EXAMINATION BY MR. REINER:

2 MR. REINER:

3 Q. Mr. Nunberg, this is a continuation of
4 your deposition from yesterday where I'll be
5 asking you questions now following the questions
6 that were asked by Mr. Lindsay. Now yesterday you
7 gave a definition of denotation and connotation
8 with respect to the meaning of the words; is that
9 correct?

10 A. Yes.

11 Q. And do I understand it correctly that
12 denotation refers to a thing or person; is that
13 your understanding of the word I am saying?

14 A. The noun denotation would be a thing, or
15 a person, or a place. The denotation as a verb by
16 the activity would be another thing, but it is a
17 thing that a word picks out in virtue of the
18 semantics rules associated with the language.

19 Q. And you read the newspapers on a regular
20 basis, I assume; is that correct?

21 A. Yes.

22 Q. You read the sports pages?

23 A. Yes.

24 Q. Do you ever see any references to the
25 name Washington "redskins" in the sport pages?

1 A. Yes.

2 Q. Have you seen references to the
3 Washington "redskins" used in a denotative sense?

4 A. Yes.

5 Q. And is that the usual reference you've
6 seen for the name Washington Redskins in the
7 newspapers?

8 A. Yes.

9 Q. And would that also be true of the name
10 ""redskins"" when seen in newspapers in a sports
11 connection?

12 A. Yes.

13 Q. And I believe that you said that you
14 were an editor of the American Heritage
15 Dictionary?

16 A. I'm the usage editor and the chairman of
17 the usage panel of the American Heritage
18 Dictionary.

19 Q. Right. Now, I would like to show you
20 what has been previously marked on December 12 of
21 your deposition Number 19. And I draw your
22 attention to the middle column and the word
23 ""redskins"" in the plural with a capital R is
24 indicated therein; is that correct?

25 A. Yes.

1 MR. LINDSAY: Objection.
2 MR. REINER:
3 Q. Did I misdescribe the entry?
4 A. No.
5 MR. LINDSAY: Objection.
6 MR. REINER:
7 Q. The definition there for the word
8 "redskins" is denotative?
9 MR. LINDSAY: Objection.
10 THE WITNESS: Yes.
11 MR. REINER:
12 Q. And there is another word "redskin" on
13 that same page, is it not?
14 A. Yes.
15 Q. And is the definition given for
16 "redskin" in the singular denotative?
17 MR. LINDSAY: Objection.
18 THE WITNESS: Well, the definition given
19 for the term "redskin" contains two elements. It
20 contains a note, "informal," which speaks presumably
21 to some kind of connotation of the word, and it
22 also contains the phrase, "a North American Indian,"
23 which describes the denotation of it.
24 MR. REINER:
25 Q. And in your opinion is that two

1 different denotative references to separate
2 persons, things or objects?

3 MR. LINDSAY: Objection.

4 THE WITNESS: The two entries pick out
5 different denotations of the word.

6 MR. REINER: Okay. Now, I would like to
7 show you a document that I can represent to you is
8 a Xerox copy of the front page of the American
9 Heritage Dictionary of the English Language with a
10 page with additional words listed on it. Could we
11 have this marked for identification, please.

12 (Whereupon, Exhibit Number 44 was marked
13 for identification.)

14 MR. REINER:

15 Q. I would like to show you Exhibit Number
16 44, which I have identified as the Xerox copies of
17 the cover of a page of the American Heritage
18 Dictionary of the English Language. And I would --

19 MR. LINDSAY: Excuse me, counsel, what
20 edition?

21 MR. REINER: It's got several numbers on
22 it 1969, 1970, 1971, 1973, 1975, 1976, 1978, 1979,
23 1980, and 1981.

24 THE WITNESS: That would be the first
25 edition then.

1 MR. REINER:

2 Q. Uh-hum, right. And this is the same
3 dictionary that you're associated with?

4 A. That's the first edition of the
5 dictionary that I'm associated with. This edition
6 was prepared substantially while the dictionary
7 was owned by American Heritage Publishing. It was
8 subsequently sold to Houghton Mifflin who engaged
9 me to do the second edition, so I had no direct
10 connection with the edition that you're speaking
11 of.

12 Q. But you did have a direct connection
13 with the American School Dictionary 1977 that was
14 published by Houghton Mifflin, would that be
15 right?

16 A. No, that also was prepared on the basis
17 of the first edition of the American Heritage
18 Dictionary. And while it was prepared subsequent
19 to the sale of Houghton Mifflin, I was ^{not} engaged by
20 Houghton Mifflin until the early '80s when they
21 undertook the preparation of a second edition.

22 Q. And with respect to this other
23 dictionary that I've numbered as Number 44, is
24 there also a definition in the first column of the
25 second page for "redskins" that is denotative?

1 That's on the bottom of the lower left-hand
2 column.

3 MR. LINDSAY: You asked about "redskins"
4 in the plural, counsel, there is no such entry in
5 this Exhibit.

6 MR. REINER:

7 Q. I used the word "redskins" in the
8 plural? I apologize. I meant to say -- I should
9 have said "redskin" in the singular. Is there a
10 denotative definition given?

11 A. I don't know that it's correct to speak
12 of a definition being denotative or connotative.
13 Words are denotative or connotative. There ^{are} ~~is~~ two
14 parts to the definition. Again, a note, informal,
15 and the phrase North American Indian. The first
16 picks out, inaccurately I think, the connotation
17 associated with the word. The second speaks to the
18 denotation of the word.

19 Q. Now with respect to the connotation of
20 the word, you indicated that you believe it was
21 inaccurate just now; is that correct?

22 A. Yes.

23 Q. At the time that it was published, did
24 the editors consider that word informal to be
25 disparaging in any sense --

1 MR. LINDSAY: Objection.

2 MR. REINER:

3 Q. -- from the appearance of the word
4 informal in that connotative sense next to the
5 word "redskin"?

6 MR. LINDSAY: Objection to the extent
7 that it calls for the witness to speculate. But
8 if you're asking for this witness' expert opinion,
9 you certainly may do that.

10 THE WITNESS: I have no knowledge as to
11 what was going through the editor's mind when they
12 prepared this definition. My own speculation would
13 be that they were aware that there were
14 connotations associated with the word but perhaps
15 not sensitive to the degree to which the word
16 might be offensive to Native Americans, or if so,
17 not sufficiently concerned so as to indicate that
18 fact in the entry.

19 MR. REINER:

20 Q. Now, that was speculation on your part
21 concerning what they intended by the use of the
22 word, informal; is that correct?

23 MR. LINDSAY: Objection.

24 THE WITNESS: Yes.

25 MR. REINER:

1 Q. The word itself, "informal," does not
2 have a connotation of being disparaging, does it?

3 A. Not by itself.

4 MR. REINER: I would like to have this
5 document marked as Exhibit 45, please. It's an --
6 I can represent to you it is -- the first page of
7 this document lists certain words that appear in
8 Webster's New Twentieth Century Dictionary of the
9 English Language, Unabridged, Second Edition.

10 (Whereupon, Exhibit Number 45 was marked
11 for identification.)

12 MR. REINER:

13 Q. First may I ask you, do you recognize
14 the Webster's New Twentieth Century Dictionary of
15 the English Language Unabridged as a recognized
16 and well-respected dictionary used by
17 lexicographers?

18 MR. LINDSAY: Objection.

19 THE WITNESS: Yes. I should say,
20 perhaps for purposes of clarification, that
21 Webster's is not a trademark anymore, so ^{there are} ~~there's a~~
22 number of dictionaries produced by different
23 publishers who use the name Webster's. This
24 particular dictionary is produced by World
25 Publishing, which is one of the better

lexicographical houses
~~lexicographers.~~

MR. REINER:

Q. Now, with respect to the word, "redskins," does that appear on the first, "redskin" in the singular, appear on the first page of that document?

A. Yes.

Q. Does it have a denotative and a connotative reference in the definition?

A. The definition describes only the denotation of the term as a "North American Indian" and then adds an ^{etymological} ~~analogical~~ note, "so called from the reddish or coppery color of the skin," and makes no indication as to any connotations associated with the word.

Q. Okay. And the lack of any connotation associated with the word "redskins" would indicate that the editors do not consider that that word had any label that should be applied; isn't that correct?

MR. LINDSAY: I am sorry, could I have the question read?

(Whereupon, the record was read by the Reporter.)

MR. REINER: Maybe it's an awkward

1 question. Let me rephrase it again.

2 Q. You testified to the use of labels next
3 to nouns indicating the connotation or reference
4 which the editors consider applicable to that
5 word; isn't that correct?

6 A. Yes.

7 Q. Does this word in this Exhibit Number 45
8 have any such label?

9 A. No.

10 Q. Would that indicate then that they
11 considered the word as a part of the standard
12 English language without a connotation?

13 MR. LINDSAY: Objection.

14 THE WITNESS: The question that you
15 asked has two presumptions that are independent.
16 ~~whether~~ ^{whether} a word is part of the language, standard
17 English language or not is independent of the
18 question of whether it has connotations. A word
19 like 'shyster' is a perfectly respectable English
20 word in its etymology but has strong
21 connotations.

22 As to whether the editors considered
23 that the word has connotations, as I testified
24 yesterday and as Sydney Landau, L-A-N-D-A-U,
25 indicates in the passage from his book which we

1 read yesterday, the number of words having
2 connotations greatly exceeds the number of words
3 whose connotations are so indicated in the
4 standard dictionary. So ~~this~~, from the absence of
5 a note, ~~is~~ explicitly pointing to the connotation
6 of a word, ^{we} we can make no conclusions as to its
7 status.

8 Q. And you conclude that word is part of
9 the standard English language if there is no label
10 indicating a connotation?

11 MR. LINDSAY: Objection.

12 THE WITNESS: Again, the question of
13 whether the word is part of the standard English
14 language is independent of a connotation. A word
15 can be part of standard English and have a strong
16 connotation.

17 MR. REINER:

18 Q. These editors did not indicate that this
19 word had any connotation; is that correct?

20 A. That's correct.

21 Q. Mr. Nunberg, I am going to show you a
22 copy of an Exhibit that was marked at your earlier
23 deposition as Nunberg Exhibit 15, and draw your
24 attention to the second page in the lower
25 left-hand column. There is a word, "red Indian,"

1 do you see that on the second page? Do you see in
2 the lower left-hand column "red Indian" right at
3 the bottom of the page?

4 A. Yes.

5 Q. And is a denotative definition given for
6 that word?

7 A. The definition given for that word
8 consists of the words "American Indian" in small
9 caps. That's a style used by Merriam Webster in
10 the third edition and all of the college editions
11 prepared since that time to indicate that the word
12 is synonymous with the entry indicated in small
13 caps. So what that entry means is simply that for
14 the meaning of ~~the~~ "red Indian" see American
15 Indian. So that was not an indication of
16 denotation by itself. It merely means it's a
17 cross-referencing device.

18 Q. Is there a word "redskin" on that same
19 page in that column, I believe?

20 A. Yes.

21 Q. And is a denotative definition given for
22 the word?

23 A. Again, the definition is given in small
24 caps with the words American Indian so that that
25 definition would have to be counted as a

1 cross-reference rather than a definition itself.

2 Q. Is there any connotative label placed
3 upon the word "redskin" in that edition of Merriam
4 Webster?

5 MR. LINDSAY: Objection.

6 THE WITNESS: No.

7 MR. LINDSAY: You haven't placed the
8 complete document before the witness, and the
9 witness has stated that the phrase American Indian
10 is a cross-reference. So if you are asking simply
11 about the page placed before the witness, that's
12 fine.

13 MR. REINER: Right.

14 Q. Is American Indian a disparaging term?

15 A. No.

16 MR. LINDSAY: So we are clear, so our
17 record is clear. Whatever the entry for American
18 Indian is in that dictionary, that entry was not
19 placed before the witness at the time the question
20 was asked.

21 MR. REINER:

22 Q. Whatever the entry is in the dictionary,
23 does American -- is American Indian a disparaging
24 term for Native American Indians?

25 A. No.

1 Q. No. Thank you.

2 MR. REINER: May we have this document
3 marked as Exhibit 46.

4 (Whereupon, Exhibit Number 46 was marked
5 for identification.)

6 MR. REINER:

7 Q. I can represent to you that this
8 document is a Xerox of a copy of the first page of
9 Webster's New American Dictionary published by
10 Books, Inc., a subsidiary of Publishers Company, I
11 think. Do you understand that dictionary as being
12 a dictionary accepted by lexicographers?

13 MR. LINDSAY: Objection.

14 THE WITNESS: I'm unfamiliar with this
15 dictionary. As I said, the name Webster's is in
16 public domain, so that is, anybody can use it. It
17 appears to be, from the copyright dates, ^a
18 republication of a dictionary published in 1939
19 that perhaps had gone out of copyright or somebody
20 bought the rights to the original dictionary of
21 which that was ^{a republication} ~~referring~~, so I am not in a
22 position to speak to that dictionary. It's not
23 one certainly ^{with} ~~of~~ which I am familiar.

24 Q. Is the page attached to it, is there a
25 denotative definition given for the word

1 "redskin"?

2 A. Yes.

3 Q. What is it, please?

4 A. It says a North American Indian.

5 Q. Is there any connotative meaning placed
6 with respect to the word "redskins"?

7 MR. LINDSAY: Objection.

8 THE WITNESS: No, but as I expressed, it
9 appears to be a dictionary published in 1939. I
10 have no way of knowing whether the dictionary was
11 reedited substantially ⁱⁿ ~~from~~ 1965.

12 MR. REINER:

13 Q. There's a handwritten reference "1965"
14 at the bottom of that page. I can represent to
15 you that that was placed on that by a person in my
16 law firm that indicated on this page that it was
17 republished in 1965. I did not do this
18 personally.

19 A. I don't know anything about this
20 dictionary. From the 1939 date and the 1965 date
21 and the nature of the publication, I would
22 suspect, and this is pure speculation, this is
23 simply a re-edition or a reprinting of the 1939
24 dictionary, perhaps with a label. I have no
25 knowledge of what the original dictionary was from

1 which it was prepared or whether the entries were
2 at all changed in the course of preparation.

3 MR. REINER:

4 Q. Did you join the American Heritage
5 Dictionary in the early 1980's; is that what you
6 said?

7 A. Yes.

8 Q. Would that have been '81?

9 A. I think it was a bit later than that.
10 Maybe '82 or '83. I don't remember exactly. I am
11 a member of the staff of the dictionary. I have
12 been working with the dictionary for a number of
13 years on a consulting basis, but I am not an
14 employee of the American Heritage Dictionary.

15 Q. Did you have the report of David K.
16 Barnhart provided to you at any time prior to
17 yesterday?

18 A. Yes.

19 Q. When was that?

20 A. I believe it was May of 1996, but it
21 could have been April or June.

22 Q. Did you refer to any of the dictionaries
23 listed in Mr. Barnhart's report for the definition
24 of redskin?

25 MR. LINDSAY: Objection.

1 THE WITNESS: Can you show me the list
2 so I can --

3 MR. REINER:

4 Q. This one isn't marked so let me just ask
5 you this: In doing your research work, did you
6 make reference to Webster's New World Dictionary
7 for the use of the word "redskins"?

8 MR. LINDSAY: Objection.

9 THE WITNESS: What edition?

10 MR. REINER:

11 Q. In 1972?

12 MR. LINDSAY: Same objection.

13 THE WITNESS: I looked at the World
14 Dictionary, which was at that time published by
15 ~~Prentiss~~ ^{Prentice} Hall. I don't remember if that was that
16 edition. I can't tell you which dictionaries,
17 which of these dictionaries I looked at. I looked
18 a substantial number of dictionaries that Mr.
19 Barnhart cited in his report.

20 MR. REINER:

21 Q. Did, in reviewing the number of the
22 dictionaries in his report, did you find any
23 entry, or words in the dictionary that were
24 different as reported by Mr. Barnhart?

25 MR. LINDSAY: Objection.

1 THE WITNESS: I'm sorry, are you asking
2 me whether I found any inaccuracies in Mr.
3 Barnhart's report as to what the dictionary said?

4 MR. REINER:

5 Q. Yes, correct.

6 A. No.

7 Q. Okay. I believe you said that you began
8 your work with the American Heritage Dictionary
9 sometime in the early to mid '80s; is that
10 correct, date not specifically known, but within
11 that period?

12 A. Yes.

13 Q. And prior thereto, did you see any
14 dictionaries that indicated that the word
15 "redskin" had a connotative aspect of being
16 disparaging?

17 MR. LINDSAY: Can you repeat the
18 question, please?

19 (Whereupon, the record was read by the
20 Reporter.)

21 MR. REINER:

22 Q. Let me put a time frame prior to the
23 period in which you became associated with the
24 American Heritage Dictionaries, did you see any
25 dictionaries that indicated, in a connotative

1 sense, that the word "redskin" was disparaging of
2 Native American Indians?

3 MR. LINDSAY: Counsel, are you asking
4 this witness whether he physically saw a
5 dictionary which, whether or not this witness
6 knows it, contained a particular entry, or are you
7 asking whether he actually looked up a word? And
8 I find your question calls for the witness to
9 speculate as to documents that he may have seen
10 but not read and as to entries that he may not
11 have read, so I object to the question.

12 MR. REINER:

13 Q. To the best of your recollection, did
14 you see any dictionary that indicated that the
15 word "redskin" had a connotation of being
16 disparaging prior to the time that you became
17 associated with the American Heritage Dictionary?

18 MR. LINDSAY: Objection, form,
19 foundation, and speculation.

20 THE WITNESS: I'm sorry, I am having
21 trouble understanding the question ^{did} ~~when~~ you ^{ask} ~~asked~~
22 prior to the time of my association did I see an
23 entry for "redskin" ^{that} ~~^~~ stated that it was
24 disparaging.

25 MR. REINER:

1 Q. In any dictionary?

2 A. In any dictionary? I don't know that I
3 ever looked the word "redskin" up before this
4 procedure.

5 Q. You have no recollection of seeing the
6 word "redskin" in a dictionary prior to this
7 proceeding; is that correct?

8 MR. LINDSAY: Objection.

9 THE WITNESS: Prior to this proceeding?
10 Is the date there relevant to the date of the
11 preparation of the dictionary, or the date of my
12 consulting the dictionary?

13 MR. REINER:

14 Q. The point of reference is the date upon
15 which you became associated with the American
16 Heritage Dictionary, and I'm asking you if you
17 have a recollection of ever seeing the word
18 "redskin" defined in any dictionary prior
19 thereto?

20 A. Again, I am really having trouble
21 understanding what the question is. Are you
22 asking me about when I first looked at the word
23 "redskin"?

24 Q. Do you have a recollection of seeing the
25 word "redskin" defined in a dictionary prior to

1 1985?

2 MR. LINDSAY: Objection.

3 THE WITNESS: I'm not trying to be
4 difficult, but I am really having trouble with the
5 question. Do you want to know whether or not prior
6 to 1985 in reference to the date of preparation of
7 the dictionary, or the date of looking at the
8 dictionary?

9 MR. REINER:

10 Q. No, prior to the date in 1985, or '84,
11 whatever date it is that you started your
12 association in the mid '80s, did you ever see any
13 dictionary that listed the word redskin as having
14 a connotation of being disparaging of Native
15 American Indians?

16 MR. LINDSAY: Objection, foundation.

17 THE WITNESS: If the question is, did I
18 ever look up "redskin" before 1985; the answer is,
19 I have no recollection of looking up "redskin"
20 before 1985, or indeed before the date of this
21 procedure. I take it the question is not a
22 question about the contents of the dictionaries
23 published before 1985.

24 MR. REINER:

25 Q. Now secondly, since you were engaged in

1 these proceedings as an expert, can you tell me
2 approximately how many dictionaries you examined
3 for the definition of the word "redskin"?

4 A. Perhaps 15 or 20.

5 Q. Prior to -- Strike that. Of these 15 to
6 20 that you examined, did any of the dictionaries
7 published prior to 1985 indicate that the word
8 "redskin" was disparaging of Native American
9 Indians?

10 MR. LINDSAY: Objection.

11 THE WITNESS: Yes.

12 MR. REINER:

13 Q. How many?

14 MR. LINDSAY: Objection.

15 THE WITNESS: There were, I believe,
16 three there indicated in my--

17 MR. LINDSAY: Disclosure.

18 THE WITNESS: Expert disclosure. And ^{if} I
19 can have a copy of that. I can indicate to you
20 which they were. I don't remember the dates.

21 MR. REINER:

22 Q. Was the word disparaging used as a label
23 in those dictionaries to which you have just
24 referred to for the definition of the word
25 "redskin"?

1 MR. LINDSAY: Objection.

2 MR. REINER:

3 Q. Maybe this will help you. If you will

4 look at these starting on page Number 6. I guess

5 7 is the first reference you make to a dictionary.

6 A. Right there, 3.

7 MR. LINDSAY: Actually, it is page 6.

8 The references to the OED.

9 THE WITNESS: There is --

10 MR. REINER:

11 Q. Excuse me?

12 A. OED is for the Oxford English

13 Dictionary.

14 Q. Now, did the word "redskin" in the

15 Oxford English Dictionary, which you refer to on

16 page 6, have a label that said that word was

17 disparaging?

18 MR. LINDSAY: Objection.

19 THE WITNESS: Not the Oxford English

20 Dictionary.

21 MR. REINER: Thank you. That's all my

22 questions.

23 MR. LINDSAY: Excuse me one moment.

24 MR. REINER: Can I have the last

25 question read back, please?

1 (Whereupon, the record was read by the
2 Reporter.)

3 MR. REINER:

4 Q. Did that same Oxford, the Oxford English
5 Dictionary have any label next to the word redskin
6 that indicated that it was scandalous?

7 MR. LINDSAY: Objection.

8 THE WITNESS: No.

9 MR. REINER:

10 Q. Did it have any label next to the word
11 "redskin" that indicated that it's immoral?

12 MR. LINDSAY: ^{Objection}~~Organization~~.

13 THE WITNESS: No.

14 MR. REINER:

15 Q. Now, if you go to this page 7 there's a
16 reference there to the Encyclopedia Britannica; is
17 that correct?

18 A. Yes, to the Eleventh Edition of the
19 Encyclopedia Britannica.

20 Q. Does that Encyclopedia ~~of~~ Britannica use
21 any labels with respect to the definition of a
22 word?

23 MR. LINDSAY: Objection.

24 THE WITNESS: The Britannica does not
25 label words in the manner of a dictionary. In the

1 descriptive content of the article there was an
2 indication that the term "redskin" was not in good
3 repute relative to the French and German
4 ~~equivalence~~ ^{equivalents} of that phrase.

5 MR. REINER:

6 Q. And does the reference also there have
7 scientific standing that was with respect to the
8 German and French words?

9 A. No meaning that was made in the area of
10 scientific standing.

11 Q. Does it not say that, as stated on page
12 7 and as indicated in one of the Exhibits, that
13 the words R-O-T-H-A-U-T-O, French words, P-E-A-U-X
14 R-O-U-G-E, have scientific standing?

15 A. I am sorry, I stand corrected. The entry
16 does say that those words have scientific
17 standing.

18 Q. And would that state -- excuse me, go
19 ahead.

20 A. And that phrase "redskin," in
21 particular, is not in such good repute.

22 Q. Does that indicate to you that the word
23 "redskin" does not have scientific standing while
24 the other word in German do, the other words in
25 German and French do?

1 MR. LINDSAY: Objection.

2 THE WITNESS: It indicates, at least
3 though the phrase, "not in good repute," it would
4 imply something rather more strong than simply the
5 absence of scientific standing for "redskins" in
6 as much as the other terms "red race" and "red
7 men" are also mentioned as popular terms but are
8 not singled out.

9 MR. REINER:

10 Q. In terms of the use of the word "red
11 man" and "red race," does that indicate to you any
12 type of reference for a scientific basis
13 describing the characteristic of a group within
14 the world community such as Negro, Caucasian,
15 Hispanic?

16 MR. LINDSAY: You said the usage, are
17 you referring to the mention in --

18 MR. REINER: Of course.

19 MR. LINDSAY: -- in Exhibit 36?

20 MR. REINER: Yes.

21 THE WITNESS: Let me, if I may, read the
22 sentence so that we are clear on this meaning.

23 MR. REINER:

24 Q. It's clear. Just answer the question,
25 please.

1 MR. LINDSAY: If the witness does not
2 believe his testimony is clear, and the witness
3 does not believe that the question is clear, then
4 I ask that the question be read back. And if the
5 witness does not believe that it is clear when it
6 has been read back, then the witness will tell you
7 that it is unclear and that he is unable to answer
8 the question.

9 MR. REINER: That's all I am asking.

10 MR. LINDSAY: Please read back the
11 question.

12 (Whereupon, the record was read by the
13 Reporter.)

14 MR. LINDSAY: Do you understand the
15 question?

16 THE WITNESS: I don't understand the
17 question.

18 MR. REINER:

19 Q. Fine. Now, you said there were three
20 references that, three dictionaries or references
21 that you had indicated in your report, and where
22 is the third one?

23 A. I'm sorry. The three dictionaries to
24 which I was referring included the Britannica
25 article which has certain dictionary content. And

1 the two dictionaries mentioned on page 12 of my
2 expert disclosure, the first of these, the 1967
3 American Heritage School Dictionary which
4 described the term as "^{contemptuous}~~contentious~~." The second,
5 the 1967 Random House Dictionary which describes
6 the word as "often offensive," and the 1970
7 edition of that same dictionary said that the word
8 was "often considered an offensive term."

9 So depending on whether you count those
10 two editions, or one or two different editions, ^{as}
11 there are either three or four dictionaries
12 published prior to the date that you mentioned,
13 1985, at the least that make explicit reference to
14 the disparaging connotations of the word
15 "redskins."

16 MR. REINER:

17 Q. And the reference to the American
18 Heritage Dictionary that you have there, that
19 school dictionary, the same dictionary that has
20 been marked as Exhibit Number 19, where it says
21 the American Heritage School Dictionary 1977 in
22 writing on the page.

23 MR. LINDSAY: Objection. I believe the
24 dictionary marked yesterday that witness referred
25 to was with respect to that item.

1 MR. REINER: He also testified on
2 December 17th, 1996.

3 THE WITNESS: This is a different
4 edition. The one I have before me is the 1977
5 edition published by Houghton Mifflin. The
6 American Heritage School Dictionary describes the
7 term as contemptuous, I have ^{that} in my notes here, but
8 since I don't have that dictionary and that
9 reference in front of me I can't tell you whether
10 they're the same, who they were published by, or
11 whether it's the same source.

12 MR. REINER:

13 Q. Was there a prior edition of the
14 American Heritage School Dictionary other than the
15 one appearing in Nunberg Exhibit 19?

16 MR. LINDSAY: Objection.

17 THE WITNESS: I believe there was, but
18 again, I don't have any sources in front of me. I
19 can't tell you.

20 Q. The dictionary that the pages have been
21 marked as Nunberg Exhibit 19 was the edition
22 following the one you made reference to in your
23 disclosure; is that correct?

24 A. That's correct.

25 MR. LINDSAY: Objection.

1 THE WITNESS: This was published by
2 Houghton Mifflin.

3 MR. REINER:

4 Q. And who published the other one?

5 A. If the reference here is correct, ~~I have~~
6 it would have been published by American Heritage.

7 Q. When did American Heritage sell?

8 A. It was in the mid '70s.

9 Q. And the third dictionary that you made
10 reference to besides the American Heritage was
11 what dictionary?

12 A. It was the Random House Dictionary, the
13 editions of 1967 and 1970.

14 Q. Did you provide any copies of pages from
15 that dictionary to your attorneys?

16 MR. LINDSAY: I am placing before the
17 witness what has been previously marked as Nunberg
18 Exhibit 40. Do you want to look?

19 MR. REINER: May I just take a quick
20 look at it, please? Excuse me. I'm sorry, would
21 you find it in there?

22 Q. Did you provide that dictionary to the
23 law firm of Dorsey & Whitney or did they provide
24 it to you, those pages out of that dictionary?

25 MR. LINDSAY: Objection.

1 THE WITNESS: I own a copy of this
2 dictionary and I consult it, and I believe that
3 Dorsey & Whitney produced the photocopy from a
4 copy available to them.

5 MR. REINER:

6 Q. Prior to receiving that photocopy, did
7 you look up the word "redskin" in that dictionary?

8 MR. LINDSAY: Objection.

9 THE WITNESS: Yes.

10 MR. REINER:

11 Q. Now, that dictionary indicates that the
12 word is often offensive; is that correct?

13 A. Yes.

14 Q. Does that mean that it is not always
15 offensive as used?

16 MR. LINDSAY: Objection.

17 THE WITNESS: As I indicated in my
18 testimony yesterday, the qualification often is
19 used with the terms that are generally labeled as
20 insults to exculpate or ^{expect}~~accept~~ the uses of the
21 word, for example, among members of a group in ^a~~any~~
22 jocular or defining way. So that if you look up
23 "nigger" in Merriam's, you'll find an entry along
24 the lines of "often offensive." If you look it up
25 in the American Heritage, you'll find "usually

1 considered disparaging."

2 Q. Nigger, that is?

3 A. Right.

4 Q. Not "redskin"?

5 A. I'm using this by way of analogy. That,
6 because the word is occasionally used among blacks
7 in self-reference and may not be offensive in
8 those contexts, ^{But} ~~but~~ it would certainly not be a
9 reason in reference ^{to} ~~from~~ such an entry to assume
10 that a white speaker can use nigger in a public
11 context or even a private context, particularly
12 where African-Americans are present, with impunity.

13 Q. It can be used, though, as jocularly to
14 a black American person by a friend of that
15 person?

16 MR. LINDSAY: Objection.

17 THE WITNESS: There are contexts among
18 certain black speakers, generally young speakers,
19 in which the word is used in a manner of
20 self-reference, and because such context exists,
21 lexicographers will qualify the usage with "often"
22 or "usually," but such a qualification does not
23 mean that the word can ever be used by a white
24 speaker in reference to a black speaker,
25 particularly in public context.

1 Q. And the word "redskin" in context could
2 refer to someone other than a Native American
3 person; isn't that correct?

4 MR. LINDSAY: Objection.

5 THE WITNESS: Are you referring to the
6 use of the word to refer to the Washington
7 Football Organization or to a potato?

8 MR. REINER:

9 Q. Start with a potato. That's not
10 offensive, is it?

11 A. No.

12 Q. It's not disparaging, is it?

13 A. No.

14 Q. The same with a peach, right?

15 A. Right.

16 Q. That's context, right?

17 MR. LINDSAY: Objection.

18 THE WITNESS: A little. The context is
19 also the fact that the potato and the peach are so
20 called because of the redness of their skins and
21 not ^{out} of any metaphorical ^{extension of} ~~sense in~~ the use of the
22 word to refer to the Native Americans.

23 MR. REINER:

24 Q. And in the American Heritage Dictionary,
25 the word "redskins" in the plural is used with

1 context and with reference to the National
2 Football League team from Washington, and that is
3 in reference to Exhibit 19 from your earlier
4 deposition; isn't that right?

5 A. This is the 1977 American Heritage
6 School Dictionary in which there are two entries.
7 One for "redskin" marked as "informal" and defined
8 as "North American Indian." A second for "Redskins"
9 in the plural with a capital R defined as a
10 National League Football team from Washington.

11 I would want to look through this
12 dictionary and see how in general capitalized
13 variants were handled, because this is also a
14 problem for lexicographers-whether a word has one
15 use involving generally lower case and ^a ~~the~~ use
16 generally involving capitals, that should be
17 indicated by a sub-entry or given as a separate
18 entry.

19 It's a problem that occurs, for example,
20 with the word "enlightenment," where the use of
21 the word to refer to the intellectual movement of
22 the late 20th Century is sometimes included as a
23 sub-entry or run-in, and ^{indicated as} ~~indicates~~ often
24 capitalized, sometimes given as a separate entry
25 as "in the Enlightenment" with a capital E, but

1 ^{where in} ~~wherein~~ either case there's no question that the
2 relationship between the two nobody thinks of the
3 enlightenment as a particular event. It does not
4 associate with the noun enlightenment.
5 So the ^{existence} ~~extent~~ of the separate entries
6 here may be owing to a purely ^{lexicographic} ~~geographic~~
7 difficulty in listing entries absent references in
8 the dictionary to see how those were handled.
9 Q. Does the word Enlightenment, as used
10 with a capital E, reference to a period of time in
11 western civilization?
12 MR. LINDSAY: Objection.
13 THE WITNESS: To the intellectual
14 movement that occurred at a certain period of
15 time, yes.
16 MR. REINER:
17 Q. And that has a specific meaning in the
18 context of that era or period of western
19 civilization, doesn't it?
20 MR. LINDSAY: Objection.
21 THE WITNESS: It refers to the
22 activities of a particular group of savants and
23 philosophers.
24 MR. REINER:
25 Q. That's separate and distinct from the

1 use of the word enlightenment with a lower E; is
2 that not so?

3 MR. LINDSAY: Objection.

4 THE WITNESS: It's a particular instance
5 of the word enlightenment with a lower case E.

6 MR. REINER:

7 Q. Enlightenment means, with a lower case
8 E, means activities of savants during a particular
9 period of western civilization; is that your
10 testimony?

11 MR. LINDSAY: Objection.

12 THE WITNESS: No. The word
13 enlightenment refers to a general process of which
14 one particular instance becomes so salient that
15 it's capitalized and "grows capital letters" as an
16 expression. That is what the philosopher Peter
17 Strawven (phonetic) used in the same way with the
18 ^Rrenaissance as an example of a renaissance but one
19 that is particularly salient, ^{It's} ~~that~~ it's treated
20 within a special category and may be given a
21 separate entry in the dictionary, but it ^{would} ~~might~~ be
22 ^{a mistake} ~~an issue~~ to take to conclude that these are merely
23 fortuitous homonyms on the basis of the separate
24 entries.

25 Q. Would the word the Renaissance with a

1 capital R have a secondary meaning distinct from
2 the word renaissance with a lower case?

3 MR. LINDSAY: Objection, form and legal
4 conclusion.

5 THE WITNESS: It has a distinct
6 application for a particular period of time.

7 MR. REINER:

8 Q. Does it have a distinctive meaning
9 designating a specific period of time?

10 MR. LINDSAY: Objection, form, and asked
11 and answered.

12 THE WITNESS: It denotes a particular
13 instance of the more general denotation of
14 renaissance.

15 MR. REINER:

16 Q. Does it have a specific meaning for a
17 period of time in western civilization separate
18 and distinct from the word renaissance with a
19 lower R?

20 MR. LINDSAY: You've shifted and you're
21 now asking the witness to compare the
22 enlightenment and the renaissance, and I'm not
23 quite sure if that's really what you do want to
24 ask.

25 MR. REINER:

1 Q. I want to ask if the word Renaissance
2 with the capital R has a secondary meaning from
3 the use of the word renaissance in a generic sense
4 with a lower R?

5 MR. LINDSAY: Objection, form, and legal
6 conclusion.

7 MR. REINER: I'm not asking for legal
8 opinion here, counsel. I'm asking his opinion as
9 an expert to define the term, "secondary meaning."

10 Q. Do you ever use the term, "secondary
11 meaning" in your procedure?

12 A. No, this is an area in which I work
13 extensively, but the additional secondary meaning
14 appears to be more of a legal than a linguistic
15 application.

16 Q. Does it have a linguistic application?

17 A. It's not a term of art of linguistics.

18 Q. Is there a term of art that you would
19 use in linguistics that could indicate a word like
20 the renaissance is a different application?

21 A. We speak sometimes of the word
22 ^Rrenaissance to define a specific period of time.
23 There are two relevant concepts in linguistics.
24 One, transferred or extended meaning, and the
25 other of called ^{precisification}~~presisafication~~ (phonetic).

1 Q. What does that pre --
2 A. ~~Presisafication.~~ ^{Precisification}
3 Q. What does that mean?
4 A. That's the ^{word that's used to describe a} ~~use of the word that's made~~
5 ~~process by which a term~~ ^{in which it since} becomes more precise or acquires
6 a more regal or specific denotation. But if by
7 separate and distinct meaning you mean unrelated,
8 unconnected or bearing no relationship to the
9 original or broader sense of the word, ^{then} ~~than~~
10 clearly the ^Rrenaissance is perceived by everyone
11 to be ~~a~~ related and ~~connected~~ and derived from the
12 use of the word "renaissance" in a general way to
13 mean a period of re-awakening. ^A And similarly, ^{for} ~~the~~
14 ^Enlightenment.
15 Q. You used the word, "specific
16 denotation." You used the word denotation before
17 to indicate the meaning of a noun; isn't that
18 correct, and a specific denotation means that
19 there is a specific meaning given to a noun; is
20 that correct?
21 MR. LINDSAY: Objection.
22 THE WITNESS: It means that there is a
23 specific thing that noun picks out meaning that
24 might be comprehended to involve not simply the
25 relation of the noun to the thing it picks out,

1 but attitudes are associated it expresses relevant
2 to that thing.

3 Q. Now, the word "redskins" as it appears
4 in the dictionary that's been marked as 19 in
5 front of you there, indicates "Redskins" in the
6 plural with a capital R; does it not, separate
7 from the word "redskin"; isn't that correct?

8 MR. LINDSAY: Can we have the question
9 back? We were trying to ascertain that we, in
10 fact, had the Exhibit in front of us.

11 (Whereupon, the record was read by the
12 Reporter.)

13 MR. LINDSAY: Objection.

14 THE WITNESS: If by "it" you mean the
15 entry, yes, there are distinct entries for the
16 two.

17 MR. REINER:

18 Q. Is the separate entry for "redskins"
19 with a capital R in plural the specific denotation
20 of the Washington Redskins Football team?

21 MR. LINDSAY: Objection.

22 THE WITNESS: The word "redskins" with a
23 capital R in the plural is defined as denoting the
24 National League or the National Football League
25 team from Washington.

1 MR. REINER:
2 Q. And that is what you used in reference
3 to as a presisafication; is that correct?
4 A. I said that might be relevant here. I
5 would call that an extended meaning or a
6 transferred meaning.
7 Q. Transferred meaning. But it is a
8 specific denotation; is that not right?
9 MR. LINDSAY: Objection.
10 MR. REINER:
11 Q. It is a specific denotation in reference
12 to the Washington Redskins?
13 A. Yes, it is.
14 Q. Okay. Now, you made reference to 15 to
15 20 dictionaries with one encyclopedia included in
16 that 15 or 20; isn't that right?
17 A. At least one encyclopedia.
18 Q. Did you ever look up the word "shyster"
19 in the dictionary?
20 A. I believe so.
21 Q. Did you see any label placed upon it
22 when you looked it up?
23 MR. LINDSAY: Objection.
24 THE WITNESS: I can't recall.
25 MR. REINER:

1 Q. And did you ever look up the word
2 "nigger" in the dictionary?

3 A. Yes.

4 Q. And did you see any label placed next to
5 that word?

6 A. Yes.

7 Q. And what was that label?

8 MR. LINDSAY: Objection.

9 THE WITNESS: It depends, of course, on
10 the dictionary. "Often offensive," I believe, was
11 the entry in the Merriam Webster's Dictionary.
12 "Usually considered disparaging," I believe, - this
13 is from memory, - was the entry in the American
14 Heritage Dictionary. "Contemptuous," I believe,
15 was used in other dictionaries.

16 MR. REINER:

17 Q. And did you ever look up the word Kike
18 in any dictionary?

19 A. Yes.

20 Q. And is there any label placed upon that
21 word in the dictionary that you referred to?

22 MR. LINDSAY: Objection.

23 THE WITNESS: Yes, the treatment is more
24 or less parallel to that of nigger. Saving that,
25 as I think I mentioned yesterday, the

1 dictionaries, even relative to a single
2 dictionary, are not always consistent. One word
3 may be labeled offensive with the other
4 disparaging with no apparent consistency.

5 Q. Now, in terms of the meaning of words,
6 do they have connotations that change with periods
7 of time?

8 A. Yes.

9 Q. And, for example, 30 years ago would the
10 word Negro been considered in any connotative
11 sense as being offensive --

12 MR. LINDSAY: Objection.

13 MR. REINER:

14 Q. -- to persons who are African-American by
15 descent?

16 MR. LINDSAY: Objection, form and
17 foundation.

18 THE WITNESS: 30 years ago would put us
19 in the late '60s, and I think by then certainly
20 the Black Power Movement had already begun so ^{there} ~~they~~
21 were people that were objecting to Negro. If you
22 are willing to go back 50 years I would say, no,
23 Negro was at that point the preferred term of
24 African-Americans for themselves.

25 The name of the ^{organizations} ~~organization~~ using the

1 word Negro, though, referred to themselves as
2 Negro, the standard denotative term for persons of
3 that racial background.

4 MR. REINER:

5 Q. What about colored people, is that a
6 term that's been used, or colored, or colored
7 people in the dictionaries?

8 MR. LINDSAY: Objection.

9 THE WITNESS: Yes.

10 MR. REINER:

11 Q. Are you familiar with the association
12 called the National Association of the Advancement
13 of Colored Peoples?

14 A. Yes, I believe now they use the acronym
15 NAACP, and they do use that because the
16 connotation of the word "colored people" has
17 changed.

18 MR. REINER:

19 Q. And when did they change?

20 MR. LINDSAY: Objection.

21 THE WITNESS: I made no study of it. It
22 is my impression that change would have taken
23 place in the '30s or '40s.

24 MR. REINER:

25 Q. Do you follow the newspaper coverage of

1 professional football on a regular basis?

2 MR. LINDSAY: Objection.

3 THE WITNESS: On a somewhat regular
4 basis, yes.

5 MR. REINER:

6 Q. And how many years have you been doing
7 that?

8 A. Perhaps 30.

9 Q. During this period of time have you seen
10 newspapers throughout the United States give
11 sports coverage to professional football teams?

12 A. Yes.

13 Q. And would there be literally thousands
14 of articles a year on professional football teams
15 throughout the United States in your opinion?

16 A. Yes.

17 Q. And for 30 years, would that mean over
18 30 years it would be approximately 30,000
19 articles, in that magnitude?

20 MR. LINDSAY: Objection.

21 THE WITNESS: I am sorry, you mean have
22 I seen 30,000 articles about professional
23 football?

24 MR. REINER:

25 Q. In your opinion would that be about

1 30,000 articles in newspapers, or more even, over
2 the last 30 years?

3 A. It would be a very large number, and
4 perhaps that order of magnitude. I ^{cannot}~~can not~~
5 speculate.

6 Q. Did you review any newspaper articles
7 which you independently found using the word
8 "redskins" in newspaper articles with reference
9 to the Washington Redskins Football team?

10 A. Yes.

11 Q. And where did you find them?

12 A. I found them, as I mentioned yesterday,
13 in the ^{Course}~~source~~ of an extensive search of a
14 newspaper data base.

15 Q. And there were a 100, I believe you said
16 there were a 135-thousand references to the word
17 "redskin" or "redskins" in the plural in that
18 database; is that right?

19 MR. LINDSAY: Objection.

20 THE WITNESS: Slightly more than that,
21 yes.

22 MR. REINER:

23 Q. Slightly more than that. And I believe
24 you said the vast majority referred to the team
25 the Washington Redskins Football team; is that

1 correct?

2 MR. LINDSAY: Objection.

3 THE WITNESS: Yes.

4 MR. REINER:

5 Q. And did you review any of those vast
6 majority of references to the Washington Redskins
7 Football team by examining any of the papers
8 referred to in that database?

9 MR. LINDSAY: Objection.

10 THE WITNESS: Let me see if I understand
11 the question. You want to know whether having
12 found a citation at that time from that database
13 ~~then I went~~ ^{I then went} out to look for newspapers that were
14 referred to?

15 MR. REINER: Yes.

16 MR. LINDSAY: Are you referring
17 specifically to a hard copy edition of a
18 newspaper?

19 MR. REINER: Yes.

20 THE WITNESS: No, of course not. These
21 were digitized records of papers from Akron, Ohio
22 and St. Louis, and so on. It would have been an
23 insane enterprise to go back for the hard copies.

24 MR. REINER:

25 Q. I believe you said you filtered the

1 articles, you filtered the articles to eliminate
2 any reference to football; is that correct?

3 MR. LINDSAY: Objection.

4 THE WITNESS: Yes, but I had to look
5 through a considerable number of articles about
6 the football team in order to develop a filter
7 that would be effective in ruling those out. So I
8 looked at lots of them. And then having run the
9 filter, I still found that roughly two thirds of
10 the entries that survived the passage through the
11 filter involved references to the football team,
12 or in the singular, to members of the football
13 team, since the word "redskin" in the singular is
14 often used ^{before} ~~as~~ the name ^{of} ~~after~~ a player.

15 Q. So that would, in round figures, would
16 that be about a 100-thousand entries of the
17 135-thousand or more entries in that database that
18 made reference to the team member or to the team
19 itself?

20 A. Far more than that, on the assumption
21 that my filter did not ~~let pass-through, did not~~⁹
22 block a great many references to American Indians.
23 References to American Indians constitutes less
24 than one tenth of one percent of the printed uses
25 of the word "redskin."

1 Q. Did you make any copies of any articles
2 appearing in record in that database in hard copy?

3 A. Did I go, having found a reference, and
4 go and find the original or microfilm version of
5 that newspaper, no.

6 Q. No, okay. I believe you were shown
7 Exhibit 43 yesterday; is that correct?

8 A. Yes.

9 Q. Are any of those pages in that
10 particular document included in any pages that you
11 saw of newspapers as a result of the entries that
12 you reviewed from this database?

13 MR. LINDSAY: Objection.

14 THE WITNESS: The newspaper articles
15 included in Exhibit 43 were provided to me by
16 Dorsey & Whitney.

17 MR. REINER:

18 Q. When were they provided to you?

19 A. About two days ago.

20 Q. So they did not form any part of your
21 opinion; is that correct?

22 MR. LINDSAY: Objection, vague as to
23 time.

24 THE WITNESS: I would ask about the
25 time.

1 MR. REINER:

2 Q. Prior to two days ago, these were not
3 involved in any manner in the opinion which you
4 were forming; is that correct?

5 THE WITNESS: That's right.

6 MR. LINDSAY: Specifically the articles
7 in Exhibit 43?

8 THE WITNESS: Yes, that's correct.

9 MR. REINER:

10 Q. I would like to show you what has been
11 marked as Petitioners' Exhibit Number 22, and ask
12 you whether or not all of the documents appearing
13 in that Exhibit 22 were provided you prior to two
14 days ago?

15 MR. LINDSAY: Objection.

16 THE WITNESS: Yes.

17 MR. REINER:

18 Q. When were -- how many of those articles
19 in that Exhibit were provided to you prior to two
20 days ago?

21 A. All of them, I believe.

22 Q. When were they provided to you?

23 A. Early in 1996.

24 MR. LINDSAY: So that we are clear. The
25 witness has thumbed through the Exhibit but hasn't

1 specifically looked at each and every page.

2 MR. REINER:

3 Q. And these were provided to you by whom?

4 A. By Dorsey & Whitney.

5 Q. Did you do any original research to see
6 if there were any other newspaper articles during
7 the period of time in which there was a
8 publication indicated in these packets of
9 documents?

10 A. Yes.

11 Q. And did you find any?

12 A. I found several magazine articles and
13 passages published in magazines which we
14 discussed.

15 Q. Did you make any copies of them?

16 A. These I found on an electronic database
17 and made electronic copies of the articles. These
18 were discovered at the Text Archive at the
19 University of Virginia.

20 Q. And having made those copies in your
21 database, did you make any hard copies of them in
22 print form?

23 MR. LINDSAY: Objection.

24 THE WITNESS: Yes.

25 MR. REINER:

1 Q. And did you -- can you identify them,
2 please?

3 A. I have been handed Exhibit Number 37.

4 Q. When did you make this hard copy?

5 MR. LINDSAY: Objection.

6 THE WITNESS: I can't tell you when I
7 exactly printed that one out. The files I
8 consulted were rather -- you asked ^{when} ~~whether~~ that
9 printout was made. If that's the question, it was
10 made in the last few months.

11 MR. REINER:

12 Q. Was that made after your deposition on
13 December 17th, 1996?

14 MR. LINDSAY: Objection.

15 THE WITNESS: I can't tell you again
16 when this particular printout was made. The files
17 were downloaded prior to my deposition. I
18 believe, prior to my deposition. I mean, the
19 difference is between putting a file on your
20 ~~receiver~~ ^{server} and merely putting a pointer to a file
21 that's available on the Web; that's purely
22 technical. So I know that I had located these
23 files prior to then.

24 MR. REINER:

25 Q. And this document?

1 A. But I don't think I had downloaded it.

2 Q. This document does not replicate the
3 text which you had in your electronic files; is
4 that correct?

5 A. I don't understand the question.

6 Q. There is more than one reference on this
7 Exhibit 37; isn't that correct?

8 A. Yes.

9 Q. And this document is not a copy of what
10 was in your database, is it?

11 A. This document was produced in the
12 following manner: These texts are made available
13 in electronic form by the University of Virginia,
14 in this case on the basis often of books, or
15 magazines that are physically rare and so ~~they~~
16 can't be accessed except via electronic access.
17 They are published on pages on the Worldwide Web.
18 One can locate them on the Worldwide Web. And
19 then if one wants to make a copy, you go to that
20 source, which is the electronic ^{server} ~~receiver~~ that's
21 sitting in Virginia, refer to the pages and copy
22 out the relevant passages on to a local disk or
23 merely print them directly from the screen display
24 to a printer, so that whether they live on one's
25 local disk is a purely technical ^{matter} ~~manner~~. I don't

1 even remember how I did it in this case. I assume
2 I put them in a ^{Word}~~word~~ document at that time.

3 Q. Did you read the entire document that
4 was referenced for the University of Virginia in
5 order to prepare any notes?

6 A. For each of these?

7 MR. LINDSAY: Objection.

8 THE WITNESS: Yes, I read the articles
9 and stories involved.

10 MR. REINER:

11 Q. Are these articles in anyway indicated
12 in the disclosure form which was identified in
13 this proceeding?

14 MR. LINDSAY: Objection.

15 THE WITNESS: No, they were located
16 subsequent to the preparation of that disclosure.

17 MR. REINER: All right. I made my
18 objection to this document already and the
19 testimony thereto and moved to strike it, but
20 that's on the record also.

21 MR. LINDSAY: The record will so
22 indicate.

23 MR. REINER: Sure.

24 Q. Now, with respect to your disclosure
25 statement. Do you have a copy in front of you

1 there?

2 A. Yes.

3 Q. Okay. Now I would like to refer you to
4 page 4 of 15. And ask you, did you write the
5 language that appears in paragraph 3, in the
6 paragraph, section rather 3, the first paragraph
7 thereof?

8 MR. LINDSAY: Objection to form.

9 MR. REINER:

10 Q. Did you write those yourself?

11 MR. LINDSAY: Same objection.

12 THE WITNESS: I believe these words were
13 written by Mr. Lindsay, the basis of discussions
14 that we had.

15 MR. REINER:

16 Q. I believe you testified yesterday that
17 the word "Indians" has been used as a designation
18 for all tribal groups who claim to have some type
19 of aboriginal heritage in this country; isn't that
20 correct?

21 MR. LINDSAY: Objection.

22 THE WITNESS: I am not sure what you
23 mean by tribal groups.

24 MR. REINER:

25 Q. Can you tell me, what does the word

1 "Indian" mean?

2 A. It refers to a certain collection of
3 indigenous peoples of the Americas and in the
4 continent of the United States, normally of North,
5 America usually as distinct from Eskimos and
6 A-L-E-U-T-S.

7 Q. Would the word "West Indians" as used,
8 does that have any connotation as being distinct
9 and separate from those persons that are
10 indigenous to the states of the United States?

11 MR. LINDSAY: You asked about
12 connotation, counsel, and I don't think you meant
13 to, if that's your question.

14 MR. REINER:

15 Q. In the denotative sense, does the word
16 "West Indians" have a separate and distinct
17 meaning from the word "Indians"?

18 MR. LINDSAY: Objection, form.

19 THE WITNESS: Yes, it has, in fact, a
20 distinct etymology in the sense that it is derived
21 from the phrase "West Indies" and refers to
22 someone of West Indian origin in that sense.

23 MR. REINER:

24 Q. And is the word "west" a significant
25 part of the denotative definition for the word

1 West Indians?

2 MR. LINDSAY: Objection.

3 THE WITNESS: The word "West Indian" is
4 really formed by the addition of the "a n" suffix
5 to the phrase "West Indies."

6 MR. REINER:

7 Q. And it refers to a race as a distinct
8 meaning from the word Americans as referring to
9 Native American Indians; isn't that correct?

10 A. Yes.

11 MR. LINDSAY: Objection.

12 MR. REINER:

13 Q. Does the word "Washington" before the
14 word "redskin" in anyway change or modify the
15 meaning of the word "redskins" as used in that
16 combination of words?

17 MR. LINDSAY: Objection.

18 THE WITNESS: The ^{locution, Washington} ~~calculation was~~
19 "redskins" is usually used in reference to the
20 football team.

21 MR. REINER:

22 Q. Can you think of any instances where it
23 has not been used in references to the football
24 team?

25 A. I know of none.

1 Q. Okay. In the denotative sense, does the
2 word Washington Redskins refer to any Native
3 American Indian person?

4 MR. LINDSAY: Objection.

5 THE WITNESS: No.

6 MR. REINER:

7 Q. Now, in respect to the disclosure
8 statement, I would like to refer you to page 8 of
9 15, and I would like to ask you, did you write any
10 of the text of the context of page 8 of 15?

11 MR. LINDSAY: Objection, since the text
12 appears to come from sources dated before the
13 witness was born.

14 MR. REINER: Text is a word appearing on
15 the page.

16 MR. LINDSAY: Are you asking whether he
17 wrote them in the 19th Century or whether he typed
18 them in 1996 or what, counsel?

19 MR. REINER:

20 Q. There are words that appear on this
21 page; is that right?

22 A. Yes.

23 Q. And they're typed words, right?

24 A. Yes.

25 Q. Did you type any of those words?

1 MR. LINDSAY: Specifically?

2 MR. REINER:

3 Q. As it appears on this page?

4 MR. LINDSAY: Objection.

5 THE WITNESS: If the question is, did my
6 fingers type --

7 Q. Yes.

8 A. -- the text files that were printed out
9 --

10 Q. Yes.

11 A. -- as the version of which this is a
12 photocopy; the answer is, no.

13 Q. Did you write the words in any manner,
14 such as longhand, that appear on this page?

15 A. I had available to me the text from
16 which these excerpts were drawn. Mr. Lindsay had
17 available to him the text from which these
18 excerpts were drawn. We discussed this and agreed
19 which of these citations would be most useful in
20 making the points we wanted to make from the
21 archive of newspapers available to both of us, and
22 indicated those orally or by fax, I can't recall.
23 But the actual typing of these words was done by
24 Mr. Lindsay or somebody else at the Dorsey &
25 Whitney staff.

1 Q. And the first numbered paragraph on the
2 top of the page makes reference to a headline from
3 the Rocky Mountain News, October 8, 1879. Did you
4 personally find that particular newspaper article?

5 A. No.

6 MR. LINDSAY: Objection.

7 MR. REINER:

8 Q. Under the second entry, from the Chicago
9 Tribune of August 8, 1884, did you personally find
10 that article?

11 MR. LINDSAY: Objection.

12 THE WITNESS: No.

13 MR. REINER:

14 Q. Under the third numbered paragraph
15 reference made to the Rocky Mountain News,
16 November 9, 1890, did you personally find that
17 entry?

18 MR. LINDSAY: Objection.

19 THE WITNESS: No.

20 MR. REINER:

21 Q. Paragraph Number 4, there is a reference
22 to the Rocky Mountain News, November 19th, 1890;
23 did you personally find that reference?

24 MR. LINDSAY: Objection.

25 THE WITNESS: No.

1 MR. REINER:
2 Q. There are on the following --
3 MR. LINDSAY: Can I have the last
4 question and answer back?
5 (Whereupon, the record was read by the
6 Reporter.)
7 MR. REINER:
8 Q. Now, there are 13 numbered paragraphs on
9 this page and the next two pages. Did you find
10 any of those references personally?
11 MR. LINDSAY: Objection.
12 THE WITNESS: No, those are all --
13 MR. LINDSAY: Is the word references or
14 the articles themselves?
15 MR. REINER:
16 Q. The references on the page, did you find
17 any of those articles personally?
18 A. No, those articles were made available
19 to me by Dorsey & Whitney.
20 Q. And you did not select them yourself; is
21 that correct, those 13 entries?
22 MR. LINDSAY: The articles?
23 MR. REINER: The articles.
24 MR. LINDSAY: I'm objecting to the
25 question as vague and ambiguous.

1 MR. REINER:

2 Q. Did you select these articles
3 personally?

4 A. I selected the citations from the larger
5 sheaf of articles that were to be included in the
6 disclosure.

7 MR. LINDSAY: Excuse me, counsel.
8 Someone outside the room has just indicated that
9 the phone call, of which I have previously advised
10 you, is now coming through.

11 MR. REINER: Off the record.

12 (Whereupon, a recess was taken.)

13 MR. REINER: Okay.

14 Q. You made reference before to this
15 process of filtering out all of the references
16 from these 135-thousand, I guess, cites in this
17 database, and of those I believe you testified
18 that 71 tokens referred to Native American
19 Indians; is that right?

20 A. There ^{may have} ~~have~~ been 71 distinct stories. I
21 believe there were more. There ^{have} ~~has~~ been cases,
22 some number of cases where the same story was
23 picked up on a wire service so it would be
24 reprinted by a number of different newspapers, but
25 there were 71 different stories in which the word

1 occurred.

2 Q. Now, as a linguist would that indicate
3 to you that the word "Washington Redskins" in
4 reference to the football team has a dominant
5 meaning for the word "redskins" as opposed to the
6 use of a Native American Indian person?

7 A. No, it would indicate to me only that
8 the word "redskin" as applied to American Indians
9 was extremely rare in published press stories for
10 whatever reason.

11 MR. REINER:

12 Q. And that would not indicate to you that
13 as a citation of tokens that that type of usage
14 has not caused the word to get a dominant meaning
15 separate and apart from the word "redskins"?

16 MR. LINDSAY: Objection.

17 THE WITNESS: Not at all. By analogy I
18 expect that if I looked in the press at the
19 various uses of the word "suck," I would find that
20 enormous predominant press uses involve the benign
21 and ordinary source of the term rather than the
22 vulgar sense of the term, but it would be foolish
23 for me to conclude on that ground that the other
24 meaning was not extremely prevalent in oral usage
25 or, in fact, the first sense that -- well, not in

1 this case but, in fact, a well-^{attested}~~sustained~~ sense of
2 the word.

3 Q. The benign usage would be the dominant
4 usage if there were a 135 tokens for benign use
5 and only 71 for the vulgar use?

6 MR. LINDSAY: Objection.

7 THE WITNESS: No, it would only indicate
8 that in the press people have strong reasons for
9 avoiding the word "redskins" in the press, and
10 when they do use it in the press, as noted in my
11 testimony earlier, they almost always speak about
12 it as a word rather than using it to refer to
13 American Indians.

14 MR. REINER:

15 Q. And the reference to the Washington
16 Redskins Football team in 95 or more percent of
17 those 135-thousand tokens, that would be used in
18 the denotative sense; is that correct?

19 MR. LINDSAY: Objection. That's being
20 used to denote the Washington Football
21 Organization?

22 MR. REINER: Right.

23 Q. Now, you made reference in your
24 testimony yesterday to Brits as a benign word; is
25 that correct?

1 A. As an informal neutral homonym for
2 ~~Britain~~ Britons or loosely, Englishman.

3 Q. Would that be a benign usage in Northern
4 Ireland for the Catholic population referring to
5 the Brits as, "Brits get out"?

6 MR. LINDSAY: Objection.

7 THE WITNESS: I don't know whether the
8 word "Brit" has specifically negative connotations
9 in Northern Ireland.

10 MR. REINER:

11 Q. Does it have any specific connotations
12 among Americans of Irish descent in the United
13 States?

14 MR. LINDSAY: Objection.

15 THE WITNESS: The question is whether
16 the word Brit has connotations over and above
17 references to the English or the British among
18 Irish, the Irish in the United States, and that
19 again I don't know. There are certainly ~~for~~ many
20 Irishmen in Ireland and Irish descendant Americans
21 who have strong negative associations with the
22 British in virtue of their historical Irish
23 policy, and those would be connotations that might
24 attach to the particular use of the word in
25 Ireland or Britain, or whatever. Whether the word

1 "Brit" has incorporated those connotations for
2 those speakers there, I'm not aware.

3 Q. That would be what you referred to
4 before, I believe, as -- that word escapes me
5 again, presisafication?

6 A. Let's leave that word out of it.

7 Q. But that has a specific denotative
8 meaning. That's the word that indicates a specific
9 denotative meaning; is that correct?

10 A. Right.

11 Q. Now, the word to people of Irish
12 extraction of the United States reading the
13 newspapers that are directed towards that
14 community that would use the word Brits in "Brits
15 get out," does not indicate to you that there was
16 any type of specific denotative meaning to that
17 word?

18 MR. LINDSAY: Objection. I think you
19 said denotative again.

20 MR. REINER:

21 Q. I mean the denotative in this particular
22 case?

23 A. Yes, Brits has a denotative meaning for
24 all speakers that is equivalent to British
25 speakers or British persons.

1 Q. Does it also have a connotative sense?
2 MR. LINDSAY: Objection.
3 MR. REINER:
4 Q. What context --
5 MR. LINDSAY: Objection.
6 THE WITNESS: Whether the word Brits has
7 a particular intrinsic connotative sense, I don't
8 know, for English speakers that it doesn't for
9 other persons.
10 MR. REINER:
11 Q. You made reference in your research to
12 determine that as part of your research on the use
13 of the word "Brits"; is that correct?
14 A. The ^{analogy} ~~analogous~~ would be the word ^{communist.} ~~as~~ used
15 by Cuban Americans, ~~communist~~, I would imagine
16 communist most often is associated with negative
17 connotations. That's doesn't mean that the word
18 communist has intrinsically negative
19 connotations. It's used as well by persons on the
20 left, for example, in a positive way. Hearing then
21 a sentence like, "You dirty communist" from a
22 Cuban American who has reasons to be hostile to
23 the communists, I would have no way of knowing
24 whether ^{the word} ~~communist~~ had any particular intrinsic
25 negative connotations for that speaker.

1 I know, however, by contrast that the
2 word "commie" as used in the '50s and '60s has
3 exclusively negative uses. For the word "Brit,"
4 as used in the press, I found many citations that
5 suggested a positive attitude toward Britons, and
6 others that suggested a negative toward Britons.
7 The conclusion would be that as least as used by
8 mainstream people in America the word has no
9 intrinsic connotations but rather only an informal
10 connotation.

11 Q. Okay. Did you see the motion picture
12 "Dances With Wolves"?

13 A. Yes.

14 Q. Was the word "redskins" ever used in
15 that particular picture?

16 MR. LINDSAY: Objection, compound, and
17 foundation.

18 THE WITNESS: I don't recall, and I
19 didn't look at that picture in preparation for
20 forming this opinion.

21 MR. REINER:

22 Q. And did you ever see the motion picture
23 "Last of the Mohicans"?

24 A. Yes.

25 Q. And is that based on the Orland book?

1 A. The Cooper book, you mean?

2 Q. Cooper book, excuse me, I am sorry.

3 A. Yes.

4 Q. And was there any references to
5 "redskins" in that particular motion picture?

6 A. Again, I don't recall. In as much as
7 these movies were made long after the period
8 relevant to this proceeding, I wasn't looking at
9 them in connection with forming an opinion in this
10 matter.

11 MR. REINER:

12 Q. Did you look at the "Last of the
13 Mohicans" 1930's version?

14 A. No.

15 Q. Did you look at any pictures that were
16 made by Gene Autry in the western genre during the
17 '30s or '40s?

18 A. No.

19 Q. Do you know whether there was any Native
20 American Indians portrayed in those pictures?

21 A. On the basis of antique recollection, I
22 believe there were, but I have no specific
23 memories of these movies.

24 Q. And you didn't think that was part of
25 the era of research that should be done to see

1 whether or not there was any use of the word
2 "redskins" in these pictures?

3 MR. LINDSAY: Objection.

4 THE WITNESS: I discussed with Miss
5 Courtney what movies she would like to ^{look at.} ~~It's~~
6 obviously a ^{time-consuming} ~~timely~~ business to look through them
7 entirely for occurrences of a single word, and we
8 were further constrained by the difficulty of
9 obtaining prints. At a lot of these film rental
10 places, for example, they don't generally have
11 Gene Autry movies. There's a collection of
12 western films at the Pacific Film Archive. We got
13 what we could. We ^{wanted to see} ~~got~~, for example, ~~the Briton,~~
14 ~~like,~~ Jim Thorpe All-American. We certainly
15 couldn't obtain a print of it.

16 MR. REINER:

17 Q. Now, with respect to the selection of
18 any pictures which were used in the research, did
19 you have any discussion concerning the use of the
20 word "redskins" in any pictures relating to the
21 Lone Ranger in the western genre?

22 MR. LINDSAY: Objection.

23 THE WITNESS: No.

24 MR. REINER:

25 Q. So that you did not dictate the process

1 by which any particular pictures were selected,
2 did you?

3 A. When you say "dictate," can you
4 elaborate.

5 Q. Did you give any instructions to the
6 manner in which pictures were to be selected to be
7 used in any type of study that you had to rely
8 upon?

9 MR. LINDSAY: Objection.

10 THE WITNESS: I have had numerous
11 conversations with Susan Courtney on where we
12 might find tokens of this word and what kind of
13 pictures those might be and what kinds of pictures
14 we might have access to examine a particular
15 picture on, about films and things.

16 MR. REINER:

17 Q. Do you know whether any effort was made
18 to obtain any pictures by Gene Autry?

19 MR. LINDSAY: Objection.

20 MR. REINER:

21 Q. Or involving Gene Autry?

22 A. I don't recall. This is something you
23 would have to have asked Susan Courtney. She did
24 check and see what was available ⁱⁿ on all the local
25 archives.

1 Q. And you relied upon her work; is that
2 correct?

3 A. She's a specialist in American film and
4 has worked on westerns. I certainly would rely on
5 her judgment as to what was available.

6 Q. Do you know how many pictures she
7 actually obtained to review?

8 MR. LINDSAY: Objection.

9 THE WITNESS: I can't give you a
10 specific figure.

11 MR. REINER:

12 Q. Do you know how many -- did she even
13 have a master list of pictures that were
14 potentiality to be used in any study?

15 MR. LINDSAY: Objection.

16 THE WITNESS: Perhaps 25.

17 MR. REINER:

18 Q. Do you know whether she obtained all of
19 the pictures that she had on her list?

20 MR. LINDSAY: Objection.

21 THE WITNESS: My understanding is, no,
22 she wasn't able to obtain them all.

23 MR. REINER:

24 Q. Do you know whether or not she even
25 tried to get all of those films?

1 MR. LINDSAY: Objection.

2 THE WITNESS: Without having the list in
3 front^{of} me, I can't tell you.
4 ^

4 MR. REINER:

5 Q. Do you know whether or not there were
6 any films that were available to you which she
7 didn't review that were on any list that she had
8 prepared?

9 MR. LINDSAY: Objection.

10 THE WITNESS: No.

11 MR. REINER:

12 Q. Did you have any discussions with her
13 about that specific point?

14 MR. LINDSAY: I'm sorry, there was not a
15 specific point.

16 MR. REINER:

17 Q. The last question had to do with whether
18 she had -- Strike that. With respect to your last
19 answer, did you have any discussions with her
20 about films that were available to her that were
21 on a list but which were, in fact, not reviewed?

22 MR. LINDSAY: Objection.

23 THE WITNESS: The one such discussion
24 that I recall involved some John Ford westerns. I
25 suggested we look for Fort Apache with Henry Fonda

1 and John Wayne. She did look at it and found no
2 instances of the word "redskins." We talked about
3 that movie and decided that, in fact, it was less
4 likely that the word was used in John Ford
5 Westerns.

6 ⁱⁿ
~~In~~ as much as it would have taken to
7 look at other John Ford cavalry movies another 12
8 hours of her time, we decided not to look at the
9 John Ford movies. There were similar discussions,
10 which I can not recall the details of, involving
11 other directors, but in as much as the choice of
12 any one film on this list involved several hours
13 of her time, it was necessary to make certain
14 assumptions to where the occurrences of the word
15 would be most likely.

16 MR. REINER:

17 Q. Were you aware of any motion pictures
18 that were on the list that she had where the films
19 were available but she didn't review them?

20 MR. LINDSAY: Objection.

21 THE WITNESS: Again, absent the list I
22 can't tell you if "Rio Grande," for example, or
23 one of other John Ford cavalry movies was on her
24 list. ^A and then I know that we decided that wasn't
25 worth pursuing just because of time limitations.

1 Q. Okay. Was there any random sampling done
2 in the selection of any films that had a western
3 genre?

4 MR. LINDSAY: Objection.

5 THE WITNESS: What would it mean to do a
6 random selection?

7 MR. REINER:

8 Q. Compiling a list of the names of all the
9 western films that were available in some archive
10 and then randomly trying to see every fifth film.
11 Is that how it's done?

12 A. ^{No}~~Now~~ that would be an insane waste of
13 energy.

14 Q. Would you expect that the word
15 "redskins" would be used in films having a
16 western genre?

17 MR. LINDSAY: Objection.

18 THE WITNESS: I would expect it would be
19 more prevalent in those films than others.

20 MR. REINER:

21 Q. And it was a waste of time to do a
22 random sampling of the films that were listed as
23 having western genre?

24 A. To simply take a list of western films
25 and look at every fifth one?

1 Q. Yes.

2 A. Yes, I believe that would be a terrible
3 waste of time.

4 Q. That would be a random sampling,
5 wouldn't it?

6 A. It would depend on how the original
7 selection was assembled.

8 MR. LINDSAY: Excuse me. Objection to
9 the question in that it leaves out the reference
10 to the size of the universe from which the sample
11 would purportedly be a random drawing.

12 MR. REINER:

13 Q. Would you say that there were literally
14 hundreds of films that have a western genre that
15 have been produced in the United States in the
16 last 30 years?

17 A. In the last 30 years, since 1967?

18 Q. Sure.

19 MR. LINDSAY: Objection.

20 THE WITNESS: It's not been an extremely
21 frequent genre. Well, if we go back from 1967, I
22 suppose that would be true.

23 MR. REINER:

24 Q. And in the preceding 20 years, would
25 there have been several, or hundreds --

1 A. Thousands.

2 Q. -- of the western genre?

3 A. Right.

4 Q. Do you have any idea whether or not any
5 of those thousands of films use the word
6 "redskins" in a disparaging way?

7 MR. LINDSAY: Objection.

8 THE WITNESS: I know that of the films
9 we looked at that were included in this video
10 there were a number that did use the word
11 "redskins" in a disparaging way.

12 MR. REINER:

13 Q. Okay. And other than the ones that you
14 saw in that video and the three films which you
15 mentioned, do you know of any use of the word
16 "redskins" in a disparaging way in any pictures?

17 MR. LINDSAY: Could I have the question
18 back?

19 (Whereupon, the record was read by the
20 Reporter.)

21 MR. LINDSAY: I object to the question
22 as vague and ambiguous. I am not certain what
23 three you're now talking about the witness having
24 referred to.

25 MR. REINER:

1 Q. Did you identify, yesterday, three films
2 which you actually looked at?

3 A. Right.

4 Q. And in addition to those from films on
5 the video tape, now I am asking in addition to
6 these three films which you looked at in entirety,
7 I believe you testified, and those excerpts which
8 we saw on the video, do you know of any motion
9 pictures that use "redskins" in a disparaging way?

10 MR. LINDSAY: Objection, compound, and
11 foundation.

12 THE WITNESS: I have recollections of
13 the word being used in other movies but was unable
14 to find the movie in this case, for example, of
15 Jim Thorpe All-American. In another case that I
16 know we discussed in the deposition of Miss
17 Courtney yesterday, the word was used in Fritz
18 ^{Lang's} ~~Lum's~~ (phonetic) film, "Fury," which we did not
19 include ~~for reasons stated in the video~~ ^{for reasons stated.}

20 Apart from that, I have no direct
21 evidence. I know the following, that the word is
22 fairly rare by proportion to the number of
23 westerns. That is to say that 1 in 5, or 1 in 10
24 westerns include the word, that would be a high
25 proportion. That means, to locate every citation

1 of the word, even assuming that it occurs in as
2 many as 10 percent of the westerns, would involve
3 ^{many} ~~20~~ hours of work, and since we don't have the
4 resources available to us that are available to
5 respondents in ^{this} ~~their~~ manner, we were limited in
6 the manner of search. I would also say that we
7 found ^{no} ~~a~~ tokens of the word "redskin" that would
8 support the respondents' claim that the word is
9 merely a neutral informal synonym for American
10 Indian.

11 MR. REINER:

12 Q. Did you see any films concerning the
13 Washington Redskins Football team and the use of
14 the word "redskins" in their title?

15 MR. LINDSAY: Objection.

16 THE WITNESS: No.

17 MR. REINER:

18 Q. Now with respect to these ^{many} ~~20~~ hours that
19 you made reference to, did that indicate to you as
20 a scientist that your research is dependent upon
21 the money available to you and not the data that
22 has to be looked at?

23 MR. LINDSAY: Objection.

24 THE WITNESS: There's ^{no} ~~a~~ distinction to
25 be made there.

1 MR. REINER:

2 Q. Now, with respect to the discussions
3 that you had with Miss Courtney, did you make any
4 notes of any of those discussions?

5 A. Not to my knowledge.

6 Q. Did you receive any list of films from
7 the law firm of Dorsey & Whitney that you -- they
8 suggested that you review for purposes of giving
9 an opinion?

10 MR. LINDSAY: Objection.

11 THE WITNESS: I received, early in my
12 involvement in this procedure, a list of films
13 from Steve Baird, of Dorsey & Whitney, a list that
14 contained a number of films containing "redskin"
15 in the title, or "red man." I think most of those
16 were films produced in the silent period, and I
17 don't believe we looked at any of them. For one
18 thing, they were extremely difficult to get ^{hold} ~~hold~~
19 of outside specialized archives that weren't
20 available to us here.

21 MR. REINER:

22 Q. You mentioned that there was some
23 specific archive, what did you say?

24 A. There were various film archives in
25 which these old films are made available. The one

1 that is available here is the Pacific Film Archive
2 which, is associated with the University of
3 California, Berkeley. In addition there are video
4 rental places that specialize in old films and
5 westerns and so on. The films are variously easy
6 or hard to get ^{hold} ~~ahold~~ of in some cases. Principally
7 these films don't exist or exist only in
8 specialized archives like the American Film
9 Institute in Los Angeles.

10 Q. I would like to show you Exhibit Number
11 6 and ask you, is this the list of what you just
12 referred to as having been provided to you?

13 MR. LINDSAY: This is Nunberg Exhibit 6?

14 MR. REINER: That's correct.

15 MR. LINDSAY: Objection, asked and
16 answered.

17 THE WITNESS: Yes.

18 MR. REINER:

19 Q. Did you communicate with the addressee
20 on this letter at all concerning the research that
21 you were doing?

22 MR. LINDSAY: Objection, asked and
23 answered.

24 THE WITNESS: The addressee being Mr.
25 Gumberg?

1 MR. REINER:

2 Q. Yes.

3 A. Yes.

4 Q. Did you make any effort to reach him; is
5 that correct?

6 A. No.

7 Q. When was this made available to you?

8 A. It was made available together with a
9 packet of materials I received from Mr. Baird
10 endorsed Dorsey ^{E Whitney}.

11 Q. At what time would that be?

12 A. Early in my involvement in this
13 procedure, early in 1996.

14 Q. Did you read the letter?

15 A. Yes.

16 Q. And I would like to draw your attention
17 to the last paragraph and ask you, if you could
18 just read it into the record so we have this
19 clear?

20 MR. LINDSAY: This last paragraph? The
21 letter wasn't address to him.

22 THE WITNESS: "I suspect that the above
23 films would be the best place to start locating
24 films that use the term "redskins" and depict
25 Native Americans in the stereotypical negative

1 light. Let me know if you have any questions.
2 Good luck in your search, and thank you so much
3 for your assistance."

4 MR. REINER:

5 Q. Was it your understanding that you were
6 to be retained to find motion pictures that would
7 place a stereotypical negative reference to the
8 word "redskins"?

9 A. This letter was not addressed to me.

10 Q. I know. When you saw that letter was it
11 your understanding that that was the nature of
12 your retainer --

13 MR. LINDSAY: Objection.

14 MR. REINER:

15 Q. -- to find such negative stereotypical
16 negative uses of the word "redskins" in motion
17 pictures?

18 MR. LINDSAY: Objection.

19 THE WITNESS: I did not set out to find
20 stereotypical negative portrayals of "redskins."

21 MR. REINER:

22 Q. You are aware that you were being
23 retained by petitioners in this proceeding; is
24 that correct?

25 A. Yes.

1 Q. And you were --

2 MR. LINDSAY: Objection to the form and
3 facts assumed in that question.

4 MR. REINER:

5 Q. Were you retained by attorneys for the
6 petitioners?

7 A. Yes.

8 Q. And did they explain to you what the
9 issues were in the proceedings that you're
10 testifying in?

11 MR. LINDSAY: Objection.

12 THE WITNESS: Yes.

13 MR. REINER:

14 Q. And did you understand that that was to
15 cancel the use of registrations for the Washington
16 Redskins Football team?

17 MR. LINDSAY: Objection.

18 THE WITNESS: Yes.

19 MR. REINER:

20 Q. And do you understand that it was your
21 job to find stereotypical negative uses of the
22 word "redskins" in motion pictures?

23 MR. LINDSAY: Objection.

24 THE WITNESS: I understood that it was
25 my job to find evidence to document the status of

1 "redskins" as a disparaging term. That status
2 seemed to me to be independently validated. I
3 didn't feel under any obligation to look
4 exclusively for stereotypical negative portrayals
5 of it.

6 MR. REINER:

7 Q. At the time --

8 MR. LINDSAY: Would you permit him to
9 complete his answer.

10 MR. REINER:

11 Q. Were you complete with your answer? I'm
12 sorry, I thought you had. At the time you were
13 retained, did you already make up your mind that
14 there was a stereotypical negative disparaging use
15 of the word "redskins"?

16 MR. LINDSAY: Objection.

17 THE WITNESS: That was my preliminary
18 opinion at the time of retainer and why I accepted
19 to do the work pro bono for Dorsey & Whitney and
20 for the petitioners.

21 MR. REINER:

22 Q. And prior thereto, did you not just
23 testify a few minutes ago that you had never
24 looked up the word "redskin" in the dictionary
25 prior to being retained?

1 A. I believe I looked the word up in the
2 period between when I was originally contacted by
3 Dorsey & Whitney and the time in which I said I
4 would undertake the activity on their behalf.

5 Q. And what was the period of time?

6 A. Perhaps a week, a few days.

7 Q. Okay. Now, did you make any independent
8 efforts to try to obtain any copies of any films
9 that you thought might be useful in the research
10 that was being conducted for the use of the word
11 "redskins" in films?

12 MR. LINDSAY: Objection.

13 THE WITNESS: This is independent of --

14 MR. REINER:

15 Q. Any request you made of Miss Courtney?

16 A. "Peter Pan" was a film I myself owned,
17 and I looked for several other movies. There's a
18 Marx Brothers' movie called, "Go West," which I
19 believe contains references to the use of the word
20 "redskins." It certainly has a stereotypical and
21 a very negative portrayal of Indians in it of
22 which I was unable to observe.

23 MR. REINER:

24 Q. Other than that picture, did you have to
25 get any other tapes?

1 MR. LINDSAY: Objection.

2 THE WITNESS: I looked at two others,
3 and I can't remember what they were, no.

4 MR. REINER:

5 Q. Okay. As part of your research, did you
6 attempt to obtain on any electronic source or from
7 any other source any press releases issued by the
8 Washington Redskins Football team at any time?

9 A. Not under that title. In the course of
10 doing newspaper research, I found articles about
11 the controversy surrounding the name of the team,
12 and those articles quoted team spokespersons or
13 press releases, but I didn't look for them as
14 such.

15 Q. Did you see any quotes of any press
16 release or team spokesperson indicating that the
17 team intended to use the word "redskins" in its
18 name in a disparaging way for Native American
19 Indians?

20 MR. LINDSAY: Objection.

21 THE WITNESS: If the question asks, did
22 I see any indication from a spokesperson for the
23 Washington Redskins Organization to the ^{effect} ~~extent~~
24 that it was their intent to disparage Native
25 Americans by the choice of the name, no.

1 MR. REINER:

2 Q. At any time during your research, did
3 you attempt to contact any tribal leaders from any
4 Native American Indian tribe?

5 A. No.

6 Q. Have you seen any communications that
7 would indicate that there are tribal leaders of
8 Native American Indian tribes that do not believe
9 that the word "redskins" in the name of the
10 Washington Redskins Football team is disparaging
11 of Native Americans?

12 MR. LINDSAY: Objection.

13 THE WITNESS: I have seen the letters
14 that you presented to me in the last depositions
15 which bore the signatures of tribal leaders of
16 various groups, some ^{of whom} ~~who~~ indicated that they had
17 no objections to the use of the word "redskins" by
18 the Washington organization.

19 MR. REINER:

20 Q. And since giving that deposition, have
21 you made any efforts to contact any tribal leaders
22 concerning those letters which they sent?

23 MR. LINDSAY: Objection to the extent
24 that it assumes that letters were, in fact, sent
25 by the persons whose signature appears.

1 THE WITNESS: No.

2 MR. REINER:

3 Q. I just want to cover a few more points.
4 Are you familiar with the H.J. School Dictionary?

5 A. No.

6 MR. REINER: Other than renewing my
7 motion to strike any documents which were not
8 produced pursuant to the document list in the part
9 of the disclosures, and other than any testimony
10 concerning any motion picture videos that have
11 been prepared here, and any documents produced by
12 Miss Courtney, I just want to move to strike any
13 testimony in relation thereto. And other than
14 that, I have completed my cross-examination.

15 MR. LINDSAY: I will have some
16 examination but let me review any notes to see
17 whether there's any of it that I can cut to make
18 sure we can reach our plane. Well, let's take a
19 few moments and break.

20 (Whereupon, a recess was taken.)

21 MR. LINDSAY:

22 Q. Dr. Nunberg, I have a few questions that
23 I want to ask following up Mr. Reiner's
24 examination. First, he showed you a number of
25 dictionary entries this morning including entries

1 which had no usage label for the word "redskin";
2 do you generally recall that testimony?

3 A. Yes.

4 Q. Prior to the disclosure of your expert
5 opinion on June 10, 1996, had you seen any
6 dictionaries which included a listing for
7 "redskin" but without any kind of usage note?

8 MR. REINER: Objection, unless the
9 edition be specified and the year of publication.

10 MR. LINDSAY: I am asking a general
11 question of whether he's seen other such
12 dictionaries.

13 MR. REINER: I understand.

14 THE WITNESS: Yes.

15 MR. LINDSAY:

16 Q. And did you consider the evidence of
17 such dictionaries in forming your opinion?

18 MR. REINER: Objection unless he
19 specified what dictionaries and what editions.

20 MR. LINDSAY:

21 Q. You may answer the question.

22 A. I didn't consider the absence of usage
23 labels at "redskin" to be a particularly decisive
24 piece of evidence ^{with regard} ~~as regards~~ to the status of the
25 word.

1 Q. This morning Mr. Reiner asked you some
2 questions concerning the OED, or Oxford English
3 Dictionary, and specifically I believe he asked
4 you with respect to the -- I'm placing before you
5 Nunberg Exhibit 35. This morning Mr. Reiner asked
6 you whether there was any label indicating to you
7 for the word "redskin" in that Exhibit indicating
8 that the word "redskin" was disparaging,
9 scandalous, or immoral. He asked a series of
10 questions; do you generally recall that testimony?

11 A. Yes, I do.

12 Q. Is there anything in the Oxford English
13 Dictionary that indicates to you that the word
14 "redskin" is disparaging?

15 MR. REINER: Objection unless it's
16 specific as to the definition which I inquired
17 about earlier today.

18 MR. LINDSAY: I'm specifically asking as
19 to Exhibit 40. Excuse me, Nunberg Exhibit 35,
20 which I believe is exactly what you were inquiring
21 about before.

22 MR. REINER: Yes, I am just focusing on
23 the question. Otherwise, I object.

24 THE WITNESS: Yes, there's a
25 parenthetical following the definition which

1 reads, "not the preferred term," ^{when} ~~which~~ I quoted
2 from the Oxford English Dictionary the first
3 time, I would surely have done so on the basis of
4 my own copy, which is a first edition and does not
5 include this. I have looked at this since and I
6 believe this is there, but I may not have recalled
7 it when the question was asked.

8 MR. LINDSAY:

9 Q. Is there anything else in the listing
10 for the word "redskin" that in anyway indicates to
11 you that the word "redskin" is disparaging?

12 A. As I indicated in my testimony
13 yesterday, the citations all involve context of
14 violence or savagery.

15 MR. REINER: Objection, move to strike.

16 MR. LINDSAY: And the basis, please?

17 MR. REINER: That's not what the
18 definition says and the words around used therein,
19 and there's nothing in that text that would give a
20 foundation.

21 MR. LINDSAY:

22 Q. So we are clear, sir, when you say,
23 "citations," what are you referring to?

24 MR. REINER: I'm referring to the
25 definition.

1 MR. LINDSAY: No, I'm asking a follow-up
2 question.

3 MR. REINER: I thought you were asking
4 me about my objection. Sorry.

5 THE WITNESS: The citations are the
6 examples of usage that the Oxford English
7 Dictionary gives to illustrate the sense of the
8 word. Now, in the earlier citation for 1699 which
9 I reference to the quote, "Wicked onslaughts of
10 the redskins." They precede through subsequent
11 quotations which read, for 1823, "The whites will
12 not harm the redskins when they have them thus in
13 their power." For 1851, "A strong believer in the
14 native virtues of redskins, when these savages
15 were treated well..." And for 1890, "After dark
16 the whole band renewed the attack. Kicking Bear
17 himself leading the redskins." So that all of
18 those citations indicate some context in violence
19 or savagery associated with the word.

20 Q. Sir, are you familiar with the manner in
21 which the Oxford English Dictionary treats the
22 word jew as a verb?

23 MR. REINER: Objection.

24 THE WITNESS: I haven't looked at the
25 entry for the second edition. The original Oxford

1 English Dictionary includes a sense for the word
2 to mean something to the effect of sharp trader,
3 ~~or~~ used as a noun, and a verb, "to jew." ^B Both are
4 entered without any mention of any connotations or
5 disparaging associations.

6 MR. REINER: Move to strike.

7 MR. LINDSAY:

8 Q. Who are the editors of the -- or, excuse
9 me, who were the, generally speaking, who were the
10 editors of the first edition of the Oxford English
11 Dictionary?

12 A. The first edition of the Oxford English
13 Dictionary was produced by a group of English -- I
14 should say, British lexicographers in the middle
15 of the Nineteenth Century who were preparing it
16 for the Oxford University Press, and who, although
17 they were trying to make a record of the English
18 language in a general way, were naturally
19 concerned, particularly, with British usage.

20 Q. And, sir --

21 MR. REINER: I move to strike.

22 MR. LINDSAY:

23 Q. This morning you used the expression, I
24 believe it was transferred or extended meaning; do
25 you generally recall that testimony?

1 A. Yes.

2 Q. Are you also familiar with the concept
3 of metaphorical extension?

4 A. Yes.

5 MR. REINER: Objection.

6 MR. LINDSAY:

7 Q. On what basis are you familiar with the
8 concept of metaphorical extension?

9 THE WITNESS: The various --

10 MR. REINER: Objection.

11 THE WITNESS: The various process --

12 MR. LINDSAY: Grounds for your
13 objection, please.

14 MR. REINER: One, it was not covered in
15 my cross-examination. Two, it is a usage of which
16 has nothing to do with the definitions of the
17 words that were covered in my cross-examination.

18 MR. LINDSAY: I feel quite ^{confident} ~~competent~~ we
19 will deal with both of those ^{objections} ~~examinations~~ as the
20 testimony unfolds.

21 Q. Please, would you kindly answer the
22 question then?

23 A. The various ^{phenomena} ~~phenomenon~~ of meaning
24 transfer are matters that I researched and have
25 written about extensively since my dissertation

1 which was published in 1979, and it's an area in
2 which I have a certain expertise.

3 Q. Can you please -- Strike that. Have any
4 of your works in this area been cited by others?

5 A. At the risk of some immodesty, the work
6 I did in the late '70s or early '80s on this is a
7 standard reference. There is a notion of transfer
8 function that sometimes is used to describe the
9 process whereby one sense of a word is extended to
10 yield another sense, and those functions are
11 sometimes referred to in the literature as Nunberg
12 Functions, and are widely referred to both in
13 linguistics literature and in some related
14 literature such as the psychological literature on
15 metaphorical meaning.

16 MR. REINER: Move to strike.

17 MR. LINDSAY: The basis, please?

18 MR. REINER: It's not covered in my
19 cross, and two, it is not relevant.

20 MR. LINDSAY: The same basis?

21 MR. REINER: Yes, the same basis.

22 MR. LINDSAY: All right. That's fine.

23 Q. With respect then specifically to the
24 concept of transferred or extended meaning as to
25 which you testified in your response to Mr.

1 Reiner's questions this morning, can you please
2 explain what that concept, or those concepts are?

3 MR. REINER: Objection.

4 THE WITNESS: Transfers of meaning takes
5 several forms of which the most common are
6 ~~metaphors~~ ^{metaphor} and metonymy. In the case of extension
7 of a word ~~to be~~ ^g used, for example, as the name of
8 a sports team, the transfer would be essentially
9 metaphorical in which case certain properties of
10 the core or original meaning of a word are
11 exploited in forming an extended use of that term
12 to acquire another denotation.

13 So, for example, the word hawk which in
14 its core meaning refers to a kind of animal is
15 used sometimes to refer to someone who has a
16 particularly ferocious or aggressive position with
17 regard to a matter of public policy, and that new
18 sense leans on the old sense for its efficacy.

19 Q. Does the --

20 MR. REINER: Move to strike.

21 MR. LINDSAY:

22 Q. Does this concept of transferred meaning
23 in anyway relate to your study of the word
24 "redskin"?

25 A. Yes.

1 MR. REINER: Objection.

2 MR. LINDSAY:

3 Q. And in what way?

4 A. The choice of the name "redskin" follows
5 a pattern whereby sports teams choose the names of
6 savage, ferocious, pitiless, or inhuman persons or
7 animals in order to convey an impression that will
8 strike fear into the hearts of their opponents.
9 It's thus like the usage of words like pirate,
10 buccaneer, devil, and others of that type, and
11 leans for its efficacy upon the original
12 associations of pitilessness and savagery that
13 attach to the word "redskin" in its use as applied
14 to Native Americans.

15 MR. REINER: Move to strike.

16 MR. LINDSAY:

17 Q. This morning Mr. Reiner asked you a
18 number of questions concerning the words Negro and
19 colored people; do you generally recall that
20 testimony?

21 A. Yes.

22 Q. To your knowledge have -- Strike that.
23 To your knowledge has the word "redskin" ever been
24 used as the preferred self-descriptor for American
25 Indians?

1 MR. REINER: Objection.

2 THE WITNESS: No, there are certainly no
3 American Indian organizations, for example, that
4 make use of the word "redskin" in a way analogous
5 to the use of the word colored people in the name
6 of the National Association for the Advancement of
7 Colored People.

8 MR. LINDSAY:

9 Q. This morning Mr. Reiner asked you a
10 question concerning usages of the phrase
11 "Washington Redskins" other than in reference to the
12 Washington NFL Football team; do you generally
13 recall that testimony?

14 A. Yes.

15 Q. Are you aware that the deposition of
16 petitioner Raymond Apodaca has been taken within
17 the last two weeks?

18 A. No.

19 Q. So have you seen a transcript of the
20 deposition or at least a section of his deposition
21 taken within the last two weeks?

22 A. No.

23 Q. This morning Mr. Reiner asked you a
24 number of questions concerning what has been
25 marked as Petitioners' Exhibit 22 consisting of a

1 variety of newspaper articles, and I just want to
2 make sure that your testimony from this morning is
3 clear. At some point Mr. Reiner asked whether you
4 personally found articles, and at other points he
5 asked you whether you had personally found
6 references. Could you please describe the process
7 of your receipt and review of what has been marked
8 as Petitioners' Exhibit 22?

9 A. I received the materials in Exhibit 22
10 when I first undertook this assignment from Dorsey
11 & Whitney. They contained a number of newspaper
12 articles that I might use in forming an opinion
13 about the status of the word "redskin." I went
14 through the articles, found a number of instances
15 of the word, and used those articles, used those
16 instances in forming my opinion.

17 Q. This morning Mr. Reiner asked you a
18 question or two relating to the significance of
19 money in the conduct of your research; do you
20 generally recall that testimony?

21 A. Yes.

22 Q. Do you have any experience in the area
23 of information retrieval?

24 A. I have considerable experience in that
25 area. It's the principal area of my current

1 research. I'm named inventor on several patent
2 applications involving information retrieval, and
3 I'm relatively familiar with the techniques and
4 technologies of the field.

5 Q. Generally speaking in the field of
6 information retrieval, are some matters of
7 information retrieval more efficient than others?

8 A. Of course.

9 Q. Mr. Nunberg, do you believe that you had
10 sufficient resources to conduct whatever
11 researches you deemed necessary in forming your
12 opinions in this matter?

13 MR. REINER: Objection.

14 MR. LINDSAY: Basis please.

15 MR. REINER: The basis is the testimony
16 before had to do with what his view is upon the
17 resources that were available and whether that
18 limited in any way the research that was done.
19 Your question now is whether you think that the
20 resources he has were adequate.

21 MR. LINDSAY: Well, counsel, are you
22 going to tell me that you're not going to use the
23 testimony of this morning in any way to argue that
24 the resources of this witness were insufficient?

25 MR. REINER: No.

1 MR. LINDSAY: Well then I will ask my
2 questions.

3 MR. REINER: Go ahead and ask your
4 questions. It's quicker probably to have you ask
5 the questions.

6 MR. LINDSAY: This is probably true.

7 Q. And the answer then, Dr. Nunberg.

8 A. Yes, I think the resources were more
9 than adequate. In any project of this nature there
10 are obviously restrictions imposed by the
11 resources that are available. For example, we
12 could have looked at every western film ever made,
13 or taken a thousand of those and looked at all of
14 them for tokens of the word "redskin." That would
15 have consumed, let's say, two thousand hours or
16 one person's ^{inasmuch} year of time, ~~in as much~~ as most of
17 those films would have contained no such tokens
18 and probably didn't even have to do with Indians.
19 That would have been a pointless exercise.

20 So, in conducting the search, we look
21 for movies in which tokens of the word were liable
22 to appear on the basis of familiarity with the
23 genre and descriptions and so forth. Similarly, if
24 in looking through the database, if you
25 essentially sat down and read, ran a search on the

1 word "redskin," given the enormous predominance in
2 newspapers of the use of the word to refer to the
3 Washington Football Organization, which was done
4 by the experts for the respondents, you would come
5 up, as they did, with no tokens of the use of the
6 word to refer to American Indians.

7 To overcome that, we put in place
8 reasonable filters which, in fact, did produce a
9 sizeable number of press citations of the use of
10 the word to refer to Indians. So that, in
11 general, I think we deployed the resources that
12 were available in a very efficient way and, in
13 fact, came up with, I believe, a great deal more
14 material bearing on the use than has been produced
15 by the respondent in this matter.

16 MR. REINER: Move to strike.

17 MR. LINDSAY:

18 Q. Dr. Nunberg, are you familiar with the
19 scientific method of research?

20 A. Yes.

21 Q. Is that a method that you use in your
22 own work?

23 MR. REINER: Objection. Definition of
24 the scientific method of research means?

25 MR. LINDSAY:

1 Q. Sure. Please define the scientific
2 method, your usage?

3 A. In common acceptation, the scientific
4 method involves a process whereby one forms a
5 preliminary hypothesis about whatever law or
6 generalization ^{one} was interested in; formulating
7 experiments, or procedures, or research strategies
8 aimed at either verifying or disconfirming that
9 hypothesis; revising the hypothesis in the light
10 of the results of those experiments, or procedures
11 if necessary. And in the end, ~~one has~~ a
12 satisfactory degree [&] certainty is reached and
13 confirms the hypothesis.

14 Q. Is part of the scientific method then to
15 begin such a course of study with a preliminary
16 assumption?

17 A. It's impossible to conduct any kind of
18 scientific research without some preliminary
19 hypothesis.

20 Q. Using the scientific method that you
21 have just described?

22 A. Exactly.

23 Q. This morning Mr. Reiner --

24 MR. REINER: Objection. Excuse me, note
25 my objection and move to strike unless a basis is

1 laid as to what this witness's preliminary
2 hypothesis was when it occurred and how it
3 occurred.

4 MR. LINDSAY: You asked your questions
5 this morning on this topic and I am simply doing a
6 redirect.

7 MR. REINER: I understand, but I have to
8 state on the record.

9 MR. LINDSAY: That's fine.

10 Q. This morning Mr. Reiner asked you some
11 questions concerning an edition -- excuse me,
12 concerning films that you might have independently
13 obtained, and I believe one of them you mentioned
14 was "Peter Pan"; do you generally recall that?

15 A. Yes.

16 Q. I believe you stated that you own a copy
17 of "Peter Pan"?

18 A. Yes, I do, or rather my daughter.

19 Q. What is the significance of you, or your
20 daughter owning a copy of "Peter Pan"?

21 A. Well, my daughter has an extensive
22 library of the Disney cartoons and I have watched
23 most of them a number of times, and I borrowed her
24 copy of "Peter Pan" because I watched it with her
25 a number of times and recall that there were

1 references to the word "redskins" and also comic
2 and demeaning portrayals of American Indians in
3 that movie. In fact, my daughter, when I asked
4 her not long ago if she knew what "redskins"
5 meant, she knew only in the sense to mean American
6 Indian and was not, to my surprise, aware that it
7 designated a football team. I would wager that
8 half the seven-year-olds in America have seen
9 "Peter Pan" and a relatively smaller portion than
10 that have watched a Washington Redskins Football
11 game.

12 I would be quite ^{confident} ~~confident~~ in assuming
13 that most people learn ^{first} ~~in~~ the sense of the word to
14 refer to American Indians, ^{well} ~~well~~ before that
15 they're aware that it has a metaphorical extension
16 to refer to a football team.

17 MR. LINDSAY: I have nothing further.

18 MR. REINER: I just have a question.

19 Q. You used the Oxford Dictionary there and
20 made references to certain usages and you read, I
21 believe, what they were?

22 A. Right.

23 Q. In each instance could the word Indians
24 have been substituted for the word redskins in the
25 context in which it was used?

1 MR. LINDSAY: Objection, form.

2 THE WITNESS: What do you mean, "could
3 be substituted"?

4 MR. REINER:

5 Q. Would the meaning of the sentence been
6 exactly the same if the word Indians have been
7 used?

8 A. No.

9 Q. Have you ever seen any reference to the
10 use of the word savagery with Indians?

11 A. I believe so.

12 Q. Does the use of the word "savage
13 Indians" have the same connotation as "savage
14 redskins"?

15 A. It has such connotations as are
16 contributed by the word "savage" in either case.
17 Now, the word "redskins" contributes a further
18 connotation of savagery and brutality. ^{Whatever} ~~whatever~~
19 the particular disparaging association is, it
20 would be rather like asking whether the phrase
21 "crooked lawyer" has the same connotation as the
22 phrase "crooked shyster." ^{phrases} Both ~~cases~~ have the
23 implication of crookedness, but "shyster" attributes
24 a further connotation with regard to its
25 denotation.

1 Q. And with respect to the use of the words
2 in the Oxford Dictionary, you indicated that they
3 were intended for British use; is that correct?

4 A. No. The Oxford English Dictionary was
5 intended to be a record of the English language as
6 spoken throughout the world, but the preponderance
7 of work was done by British people and the
8 gathering of the citations were for the most part
9 in Britain. The ^{compleirs}~~compliers~~ were British. And at
10 the time of the original inception of the project
11 in the middle of the Nineteenth Century, the focus
12 of English language ^{and} literature was certainly still
13 in the British Isles, so that American usages, ~~and~~
14 not to mention Australian use, and not to mention,
15 I think, ~~from~~ the rest the world, were not
16 necessarily cited for the ~~use of the~~ compilation
17 of the work.

18 Q. Now, I believe also again in your
19 redirect, you used the word self-describer with
20 reference to persons using words such as
21 "redskins" among a group of Native American
22 Indians?

23 MR. LINDSAY: Self-descriptor.

24 MR. REINER:

25 Q. Is that it?

1 A. Yes.

2 Q. And then you are aware then that there
3 are teams of football, of the game of football
4 played on reservations where the word "redskins"
5 is used?

6 MR. LINDSAY: Objection form, and asked
7 and answered.

8 THE WITNESS: Yes.

9 MR. REINER:

10 Q. Is that called a self-descriptor?

11 MR. LINDSAY: Excuse me, and foundation.

12 MR. REINER:

13 Q. Is that a self-describer?

14 A. Yes, but --

15 Q. And do all of the members of every team
16 and -- you're not finished. Go ahead, I'm sorry.

17 A. -- but it is not so used as the word
18 colored people in a descriptor like the National
19 Association for the Advancement of Colored People,
20 which names an official organization and not in a
21 defiant way, ^{as with a} ~~a~~ local football team.

22 Q. Do you have any information that the use
23 of word "redskins" in the local football team is
24 meant to be defiant?

25 A. It's consistent with the use of such

1 epithets by other ethnic groups.

2 Q. Have you seen any letters or information
3 whereby a tribal chief indicated that the use of
4 the word "redskins" by the college football team
5 was considered to be an honor to the tribe?

6 MR. LINDSAY: Objection.

7 THE WITNESS: I have seen, I believe,
8 one letter from the -- bearing the signature of an
9 official of the Miami tribe thanking the
10 University of Miami for its help in some Indian
11 projects and approving of the continued use of, I
12 believe, Miami Redskins.

13 MR. REINER:

14 Q. Now, have you seen any writings
15 concerning the Washington Redskins Football team
16 which refers to the need for high levels of skill
17 on the playing field?

18 A. Not concerning the Washington Redskins
19 Football team, per se.

20 Q. But football teams, per se, in general,
21 professional football teams?

22 A. I don't need to see writings to know
23 that it requires an extraordinary skill to play
24 football.

25 Q. Does it also require bravery?

1 MR. LINDSAY: Objection.

2 THE WITNESS: Sure.

3 MR. REINER:

4 Q. And does it also indicate positive
5 values of teamwork by players on a professional
6 football team?

7 MR. LINDSAY: Objection.

8 THE WITNESS: Yes.

9 MR. REINER:

10 Q. Would that in the same context apply to
11 the Washington Redskins Football teams, those
12 attributes of the team players?

13 MR. LINDSAY: Objection.

14 THE WITNESS: If by that do you mean
15 that, do I believe that Washington Redskins
16 Football players are dedicated, hardworking,
17 extraordinarily skillful and brave individuals,
18 the answer is, yes.

19 MR. REINER:

20 Q. And is that the perception of the team
21 to your knowledge?

22 MR. LINDSAY: Objection.

23 THE WITNESS: I think it depends on what
24 cities you're asking it in, but yes, in a general
25 way.

1 MR. REINER:

2 Q. And in the context of the use of the
3 persons playing under the team under the name
4 Washington Redskins, does it project a positive
5 image?

6 MR. LINDSAY: May I have the question
7 back, please?

8 (Whereupon, the record was read by the
9 Reporter.)

10 MR. LINDSAY: Objection, vague and
11 ambiguous, speculation, foundation. ^{THE WITNESS:} The question,
12 I think, is confusing the process whereby the
13 meaning is transferred. In the case of a team
14 name, the transfer proceeds ^{from} in the core or
15 original use of the term to the derived or the
16 metaphorical use of the term and not backwards, ^{So} ~~so~~
17 you might as well ask, for example, whether the
18 manifest capacity and the bravery of the men of
19 the New Jersey Devils Hockey team ^{redounded to the} ~~were bound by~~
20 ~~duty to credit~~ ^{of} the Price of Darkness, the answer
21 would be it's not relevant.

22 MR. REINER:

23 Q. In terms of the public's perception of
24 the Devils team, does the fact that they, the team
25 members work together as a team and have high

1 levels of skill project a positive image with
2 respect to the use of the word Devils for the team
3 name?

4 MR. LINDSAY: Objection.

5 THE WITNESS: No, the process -- Strike
6 that. No, the properties of the extended
7 denotation of the term doesn't in turn reflect
8 back on the original sense of the meaning. So if
9 the question is, do people have a positive
10 association with that organization, I assume if
11 you are a New Jersey Devils fan you do, but it
12 does not mean that the performance of the New
13 Jersey Devils team is capable of redeeming the
14 reputation of the individual after whom their team
15 is named.

16 MR. REINER:

17 Q. Does it also, does the word "devils"
18 also indicate to you then that there is a
19 perception that that team is satanic?

20 MR. LINDSAY: Objection.

21 THE WITNESS: Satanic is the wrong word,
22 because I don't think the Devils have chosen their
23 name because of the particular associations with
24 that individual, real or mythical, ⁱⁿ ~~In~~ virtue of
25 those denoted by the word satanic, I think the

1 implacability, the mischievousness, the
2 pitilessness of the devil are all properties that
3 team wanted to evoke in choosing that name for
4 itself.

5 MR. REINER:

6 Q. And with respect to the use of the word
7 "Vikings" by the Viking Football team, does that
8 disparage people of Swedish extraction?

9 MR. LINDSAY: Objection.

10 THE WITNESS: Vikings is a complicated
11 case because ^{inasmuch} ~~in as much~~ as the team is located in
12 an area which has a large Scandinavian population,
13 it can be ^{regarded} ~~regarding~~, to a certain extent, as
14 analogous to one of those local names I mentioned
15 yesterday like the Green Bay Packers, for example,
16 or the San Diego Padres. In this case, though,
17 there is also a people associated, historical
18 people associated with that population noted for
19 their pitilessness and savagery, among other
20 things.

21 MR. REINER:

22 Q. So with respect to that name then, is
23 that name disparaging of people of Swedish
24 extraction?

25 MR. LINDSAY: Objection.

1 THE WITNESS: I don't know what the
2 answer would be if there were existent today a
3 group of people who might be appropriately
4 described as Vikings. ^TThere are none such, and so
5 the question of it being disparaging doesn't
6 arise.

7 MR. REINER: I have no further
8 questions.

9 MR. LINDSAY: I have nothing further.
10 He reserves the right to read and sign. And just
11 so we are clear, I believe we said that on the
12 record yesterday, but we have agreed that
13 depositions taken during the discovery phase of
14 these proceedings concluding with the elimination
15 of Dr. Nunberg would be so taken, would be treated
16 as if taken during the trial stage of these
17 proceedings and may accordingly be used by the
18 party.

19 MR. REINER: So stipulated.

20
21 Whereupon, the deposition concluded
22 at 1:04)

23 -----
24 GEOFFREY NUNBERG
25

1 STATE OF CALIFORNIA)
2)
3 COUNTY OF SAN FRANCISCO)
4
5

6 I, Karla Shallenberger, do hereby certify:

7 That I am a Certified Shorthand Reporter,
8 License No. 10752 of the State of California; that
9 I was duly appointed Official Shorthand Reporter
10 by the above named Court in the foregoing entitled
11 court and cause;

12 That on the 19th day of February, 1997 I
13 fully, truly and correctly took down in shorthand
14 writing all of the proceedings had and all of the
15 testimony given in said matter;

16 That I thereafter truly, fully and correctly
17 transcribed the same into typewriting, and that
18 the foregoing pages, 379 through 499 inclusive,
19 are a full, true and correct transcript of my said
20 notes taken at the time and place therein stated.

21 IN WITNESS WHEREOF, I have hereunto set my
22 hand this 12th day of March 1997.

23 *Karla Shallenberger*
24 KARLA SHALLENBERGER
25 Certified Shorthand Reporter
 License No. 10752

IR 2: Ross 2/20/97

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Suzan Shown Harjo, et al,

Petitioners, CANCELLATION No. 21,069

vs.

Pro-Football, Inc.,

Respondent.

COPY

DEPOSITION OF

DR. IVAN ROSS

February 20, 1997

10:00 a.m.

Reported by:

CHRISTOPHER J. HEGLE

Ray J. Lerschen & Associates
620 Plymouth Building
Minneapolis, Minnesota 55402
(612) 341-2122

1 DEPOSITION OF DR. IVAN ROSS, taken
2 on the 20th day of February, 1997, commencing at
3 10:00 a.m., at Dorsey & Whitney, Pillsbury Center,
4 South, 220 South Sixth Street, Minneapolis,
5 Minnesota, before Christopher J. Hegle, Notary Public.

6

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A P P E A R A N C E S

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 MICHAEL LINDSAY, ESQ., Dorsey & Whitney,
Pillsbury Center South, 220 South Sixth Street,
Minneapolis, Minnesota, 55402, appeared
representing the Petitioners.

 JOHN P. REINER, ESQ., White & Case, 1155
Avenue of the Americas, New York, New York,
10036-2787D, appeared representing the Respondent.

I N D E X

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EXAMINATION BY:

PAGE

Mr. Lindsay

4

Mr. Reiner

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Mr. Lindsay

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Mr. Reiner

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1 DR. IVAN ROSS,
2 after having been duly sworn, was examined and
3 testified as follows:

4 EXAMINATION

5 BY MR. LINDSAY:

6 Q Would you please state your name?

7 A Ivan Ross.

8 Q And your current home address?

9 A 7315 West Franklin Avenue, St. Louis Park, Minnesota,
10 55426.

11 Q What is your current occupation?

12 A I am a consultant. I have a business entity called
13 Ross Research. I provide consulting services to
14 companies or law firms that need my assistance as a
15 consumer psychologist or as a marketing research
16 person.

17 (Off the Record.)

18 BY MR. LINDSAY:

19 Q Can you tell us your educational background, Dr. Ross?

20 A I have a bachelor's degree in psychology from Miami of
21 Ohio in '61, a master's in consumer and industrial
22 psychology from Purdue in '63, and a Ph.D. in
23 industrial and consumer in '66.

24 Q From where?

25 A From Purdue.

1 Q Following receipt of your Ph.D., were you employed in
2 the academic world?

3 A Ultimately. My first full-time job was at General
4 Mills for a year and a half as a research
5 psychologist, and then a year as a professor on a
6 floating university. I joined the University of
7 Minnesota faculty in 1968.

8 Q How long were you employed at the University of
9 Minnesota?

10 A Twenty-seven years.

11 Q In the course of your career, have you published any
12 literature in your field?

13 A Yes.

14 Q I'm showing you what has previously been marked as
15 Ross Exhibit 1. Just so our record is clear, Ross
16 Exhibit 1 consists first of some typed material
17 followed by Tabs 1 through 10. Do you see that?

18 A Right.

19 Q During our deposition today, all of the questions I
20 ask that concern an exhibit will concern Ross Exhibit
21 1, and I will also refer to the various tabs within
22 Ross Exhibit 1. Is that agreeable?

23 A Sure.

24 Q Could you please turn to Tab 1 of Ross Exhibit 1?

25 A Yes.

- 1 Q What appears to be on that tab?
- 2 A This is my resume as of May of 1996.
- 3 Q And as of that date was it reasonably accurate?
- 4 A Yes.
- 5 Q And reasonably current?
- 6 A Yes.
- 7 Q Does it list your employment history?
- 8 A Yes.
- 9 Q Does it list your publications as of that date?
- 10 A Yes.
- 11 Q And does it list your other professional activities as
- 12 of that date?
- 13 A Yes. Well, it lists trial testimony or legal matters
- 14 in which I've offered sworn testimony. It does not
- 15 list consulting that I've done for companies outside
- 16 of the context of litigation.
- 17 Q Have you done such consulting?
- 18 A Oh, yes.
- 19 Q When you say consulting outside of the context of
- 20 litigation, what do you mean?
- 21 A Well, I mean to include studies done for advertising
- 22 agencies or their clients regarding consumers'
- 23 motivations and attitudes about products or services,
- 24 what their likely reactions would be to ^{some} ~~run~~
- 25 advertisements.

1 I have done some work relating to
2 regulatory agencies' interests that are not really
3 litigation-specific but just general survey research
4 kinds of consultancies, where I would give advice or
5 help in one way or another with some issue having to
6 do with research or consumer behavior. Bank image
7 studies. I mean, there's just lots of non-litigation
8 related things.

9 Q Going back to the area of litigation, have you worked
10 for a variety of law firms throughout the country?

11 A Yes.

12 Q Have you worked with Mr. Reiner's former firm of
13 Townley & Updike?

14 A Yes.

15 Q You've referred to part of your work being the
16 determining of various public attitudes. How does one
17 go about determining or -- well, precisely, how do you
18 go about determining public attitudes?

19 A Well, of course, it depends a lot on what it is you're
20 going to be asking people about. Do they have to see
21 something or hear something, you know, and that has a
22 lot to do with the methodology that you would you
23 select.

24 But if the issue is to measure public
25 attitudes or a segment of that public's attitude on

1 something which can be presented telephonically, then
2 a typical procedure would be to have a random digit
3 dial calling structure established, and then the
4 actual method by which telephone numbers are drawn
5 would depend upon whether you're trying to reflect the
6 general population, which was one of the surveys I
7 ended up doing here, or whether you're trying to get
8 to a more limited, narrow population, a less frequent
9 population, where you have to set up some kind of a
10 stratification to execute your sample.

11 But typically you try to draw a broad
12 representative sample of that segment's opinion and
13 try to be as fair as possible in the methods by which
14 you make your calls so that everybody has a chance to
15 be in the sample. And some random procedure in this
16 -- frequently I use what I call the next birthday
17 technique, or what the field calls the next birthday
18 technique, to find a random person in the household
19 with which to do the survey. That would be the
20 typical procedure.

21 Q You've referred to what the field would do. Is there
22 a field of knowledge and learning that you're
23 referring to?

24 A Yes. Generally, survey research and marketing
25 research more broadly, but survey research has its own

- 1 identity. But typically it would be contained within
2 textbooks and marketing research and articles
3 published in the academic literature concerning the
4 conduct of surveys, particularly the Journal of
5 Marketing Research, and then the applied marketing
6 research journals published through the Marketing
7 Research Association or through other professional
8 associations in our area.
- 9 Q And is that a field of learning with which you are
10 familiar?
- 11 A Yes.
- 12 Q Is that, in fact, the field of learning in which you
13 have worked for your career?
- 14 A Yes. And I've taught ^{dozens} ~~dozen~~ of years' worth of
15 marketing research courses to both graduate and
16 undergraduate students.
- 17 Q And I take it from your testimony as to methods you've
18 used in the past that you have in fact conducted
19 surveys in the past, is that correct?
- 20 A Oh, yes.
- 21 Q Are there recognized methodologies for conducting
22 surveys?
- 23 A Yes.
- 24 Q And is that what you testified to a few moments ago?
- 25 A Yes.

1 Q Now, you said that you conducted some surveys in this
2 particular case, and I believe you referred first to a
3 general survey and then to a Native American survey.
4 I'd like you to turn again to Ross Exhibit 1. Excuse
5 me. Before you do that, can you tell us generally
6 what surveys you conducted in this matter?

7 A Yes. Generally, there were two surveys. One is
8 characterized as a general population survey. That
9 consisted of approximately 300 adult Americans in the
10 48 contiguous states. The second sample narrowly
11 would generally be described as a survey of Native
12 American people. Again, a sample size of 300 was
13 targeted to be the required minimum for Native
14 Americans who identified themselves as being members
15 of a tribe, a Native American tribe.

16 Then there were some additional respondents
17 who identified themselves as Native Americans but who
18 said that they were not members of tribes. Those
19 people I characterized, along with the others, as part
20 of the Native American sample. That would -- that was
21 also a random method for deriving their telephone
22 numbers and accomplishing the interviews.

23 Q Now, if you would turn to Tab 3 in Ross Exhibit 1 --

24 A Okay.

25 Q Which is a two-page document headed Robinson &

1 Muenster Associates, Inc.?

2 A Yes.

3 Q What is that document?

4 A This is Jim Robinson's -- who's the president of
5 Robinson & Muenster -- memorandum that I requested
6 that he send to me so that I could include it in the
7 report to describe the sampling procedure for the
8 Native American study consisting of again the two
9 samples that I have described generally. First, the
10 general population study, and then second, the
11 sampling procedure for the Native American sample.

12 Q I take it that the Robinson & Muenster firm worked
13 with you in the conduct of the two surveys that you
14 conducted in this case?

15 A Yes.

16 Q Have you worked with Robinson & Muenster before?

17 A Yes.

18 Q Are you familiar with Robinson & Muenster's
19 reputation?

20 A Oh, yes.

21 Q Based on your direct experience and your knowledge of
22 the reputation of Robinson & Muenster, have you formed
23 any opinions as to the quality of services provided by
24 Robinson & Muenster?

25 MR. REINER: In this case?

1 MR. LINDSAY: Generally speaking.

2 THE WITNESS: Yes.

3 BY MR. LINDSAY:

4 Q And what is that opinion?

5 A Well, they have an excellent reputation and are
6 frequently used in telephone survey work and have been
7 especially active in doing U.S. Government surveys, as
8 well as surveys for at least the Democratic Party.

9 I'm not sure about the Republicans. ^{They do n} ~~But the~~ National
10 ^s Studies of ^c Consumer ^v Opinion and for candidates
11 especially have been very active in doing telephone
12 surveys nationally.

13 Q Okay. Can you please explain the methodology for
14 which you have called the general survey?

15 A Yes. The general survey as described in this Tab 3
16 portion is what would be characterized as a random
17 digit dial sample for representing the general adult
18 American population. There are details of the actual
19 execution of the sample in terms of the acquisition of
20 the actual telephone numbers, which are identified at
21 certain other places in the documents, but basically I
22 -- and I think Robinson & Muenster always just does
23 anyway -- use a company called Survey Sampling, which
24 is the largest source of telephone numbers for samples
25 in the United States.

1 It's a company that you can work with to
2 derive samples in a variety of ways, whether it is a
3 listed sample, people that are in telephone books in
4 certain cities, whether it is a random digit sample
5 where you're asking the company to supply you with
6 lists of numbers that are very likely to contain
7 households -- because we don't want to be talking to
8 businesses, so they'll exclude the telephone bank
9 prefixes describing or identifying businesses so that
10 you can end up with a household list -- and also, as
11 we did this case, to make sure is that it's a true
12 random digit dial sample, so that you end up with
13 households that may not be listed in telephone
14 directories, as many households are not in the United
15 States.

16 So you end up having every telephone
17 household as a potential household, depending upon
18 what your stratification procedures are, to end up
19 with a ^{final} ~~file~~ sample. So essentially this ends up to be
20 a random sample of all telephone households in the
21 United States, with some adjustments made to the
22 sample acquisition, you know, to ensure that you are
23 less likely to be talking to businesses and to ensure
24 that you're in non-listed as well as listed telephone
25 households.

1 Q Is the random digit dial method which you have
2 described a method commonly used in your profession?

3 A Yes. Unless there is a reason that you don't need
4 that kind of sampling plan, because if you're going to
5 survey all attorneys or all doctors or something like
6 that, we have other sources that you can get the
7 telephone numbers from.

8 In general, except for that kind of
9 situation, if you're doing a telephonic survey, you
10 would work through Survey System or Genesis. There
11 are only a couple of companies that have procedures
12 which are regarded as good from the point of view of
13 survey people in the United States.

14 Q Based on your experience in the survey field, once one
15 has conducted a random digit dial survey as you have
16 just described, is one able to form opinions as to
17 attitudes of the population more generally?

18 MR. REINER: Objection.

19 BY MR. LINDSAY:

20 Q Let me rephrase that question. When you would conduct
21 a random digit dial survey of a certain number of
22 people, I take it that means that you have asked that
23 number of people whatever questions it is that you
24 wanted to ask, is that correct?

25 MR. REINER: Objection.

1 THE WITNESS: Yes.

2 BY MR. LINDSAY:

3 Q And you get their answers?

4 A Yes.

5 Q Once you have obtained the answers from the pool of
6 persons within your random digit dial, are you able to
7 offer general opinions on the basis of such data?

8 MR. REINER: Objection.

9 THE WITNESS: Yes.

10 BY MR. LINDSAY:

11 Q I'd like you to turn to the second survey that you
12 conducted. Can you please describe for us what that
13 survey was and what its methodology was?

14 A Yes. That's described in the same place here on Tab
15 3. It basically first selected the 20 most populace^{Native American}
16 states. I'm not referring to the -- excluding Alaska
17 and Hawaii. And I think I touched on some of the
18 reasons for that in the earlier deposition. And then
19 having identified the most populace^{Native American} states, counties
20 and census tracks were examined in each of those
21 states in order to come up with a set of areas which
22 would fairly represent both rural and urban areas for
23 the actual telephone draw.

24 You'll notice when we look at that portion
25 of the other tabs that the actual telephone numbers

1 that are supplied by ^{Survey Sampling} ~~survey sampling~~ are given on an
2 area code basis and not on a census track or county
3 basis -- because that's how they hold telephone
4 numbers in their computers.

5 And so we wanted to make sure that the
6 sample was a random sample but not a sample that was
7 executed in an absolute random way, which would have
8 required calling, you know, everybody in the U.S. to
9 find the less than one percent of the households in
10 which there would be a Native American person. That
11 would have been an extraordinarily time-consuming and
12 expensive and ridiculous sampling procedure. Because
13 you don't need to do that in order to fairly represent
14 opinions of a group that has a low incidence in the
15 population.

16 So what we did was to build that sample to
17 be a random digit dial sample, reflecting both rural
18 and urban Native Americans in the most populace Native
19 American states in the United States, and ending up
20 with purchasing a number of replicates of telephone
21 numbers from ^{Survey Sampling} ~~survey sampling~~ that were defined by area
22 code but which are accurately described, as they are
23 in the report, as being census track and county-based
24 -- because we looked at both of those as well as to
25 the most populace ^{Native American} state question to derive the base.

1 So it's a stratified sample in a way that
2 the general population did not have to be, because
3 there we have no reason to be looking for a very low
4 incidence percentage of the population, as we were in
5 the Native American sample.

6 Q With respect to the methodology used that you've just
7 described as to the Native American sample, have you
8 used this kind of methodology before?

9 MR. REINER: Objection.

10 THE WITNESS: Oh, yes. Frequently.

11 BY MR. LINDSAY:

12 Q Please tell me the types of circumstances in which you
13 have used this type of methodology.

14 A Well, I've used this kind of methodology in
15 identifying and ^{conducting}~~consulting~~ a survey with
16 Spanish-speaking Americans, in surveys that I've
17 conducted for numerous clients, but even including
18 work I did as a consultant to the FDA a number of
19 years ago as to consumer understanding of certain
20 patient package ^{inserts}~~insert~~ language that ^{were}~~was~~ being
21 considered, both in an English-speaking sample as well
22 as a Spanish-speaking sample.

23 ^{Native American}
23 Again, we first took the most populace_A
24 states and identified both rural and urban cuts and so
25 forth. I've done that kind of procedure generally in

1 a number of kinds of cases where is there's a low
2 incidence issue. ^{For example} ~~In other words~~, boat owners, which,
3 you know, ends up obviously sampling near where there
4 are bodies of water, and other similar low incidence
5 in the total population question.

6 Sometimes we are able to use U.S. Census
7 data to help us identify those segments. Sometimes we
8 have to use other kinds of secondary data other than
9 the U.S. Census. In this case we could use U.S.
10 Census data as a guide to identify where the people
11 were that we wanted to be interviewing.

12 Q Have you used this methodology outside of the context
13 of litigation?

14 A Yes.

15 Q Is this methodology one that is accepted within your
16 field?

17 MR. REINER: Objection.

18 THE WITNESS: It's quite commonly done by
19 everybody that I know that does these kinds of
20 surveys. So the general approach is very common.

21 BY MR. LINDSAY:

22 Q Okay. Now, once the sampling methodologies were
23 arrived at, what happens next in the process? Well,
24 let's start over. Let's start with the general
25 survey. All right?

1 A Yes.

2 Q Once you determined how you would go about identifying
3 the persons who would be called through this random
4 digit dial, what happened next?

5 A Well, we didn't identify the persons. We just
6 identified the telephone numbers that would be called.
7 Then having purchased the sample of ^{numbers} ~~material~~ from
8 Survey Sampling, then I was working on the
9 questionnaire that would be used by Robinson &
10 Muenster in the administration of the questions in the
11 surveys.

12 We can turn to that tab if you'd like so
13 that I can explain what happens next, unless you meant
14 some other issue about what happens next.

15 Q No. I am asking about the questionnaire, so if you
16 could please turn to Tab 7 --

17 A Okay.

18 Q Ross Exhibit 1.

19 A Right.

20 Q What appears at Tap 7 of Ross Exhibit 1?

21 A Tab 7 is what we call a screen print, which is of the
22 -- which means that the questionnaire was held in the
23 computer rather than on paper and pencil, the hard
24 copy. The telephone interviewers at Robinson &
25 Muenster would see what appears at Tab 7 coming up on

1 screens on their computer terminals and would read the
2 questions and whatever other instructions appeared on
3 the screen, as they are shown here in the
4 administration of the questionnaire.

5 Now, what appears here at Tab 7 is not in
6 fact the only order in which the names that were at
7 issue or the words that were at issue in this survey
8 were presented. It's just illustrative. In fact, the
9 actual administration of the questionnaire required
10 that the computer select a random order of the way in
11 which the terms that were asked about were presented
12 to the respondents.

13 So if you look at page five in this tab, it
14 shows that "Native American" was asked about first and
15 then "buck" and so forth, other words. In fact, that
16 order was randomly determined by the computer when the
17 survey was administered. This was an important part
18 of the randomization process.

19 Of the screens that don't -- a page of this
20 tab does not mean that that's all that would have been
21 seen on a screen, but this is for convenience purposes
22 the aggregation of what all of those screens would
23 have looked like, including some coding lines in the
24 tab, which have meaning only for the computer people
25 at Robinson & Muenster as to where the responses were

1 entered.

2 That was then the basis for the computer
3 summarization tabulation of the responses and for the
4 printing of the verbatim answers, where those occurred
5 in the record.

6 MR. REINER: Objection. Move to strike
7 unless this witness can testify as to what the survey
8 sampling company did in such process.

9 BY MR. LINDSAY:

10 Q Are you familiar with the methods used by Robinson &
11 Muenster?

12 A Yes.

13 Q And is the testimony based on your familiarity with
14 the methods used by Robinson & Muenster?

15 A Yes. It would be quite parallel to what I've done for
16 Townley & Updike, for example, and surveys done of
17 false advertising where I would rely on what I was
18 told by the survey house as the basis for my opinions
19 about what was done.

20 MR. REINER: Objection again, unless the
21 witness can testify as to what the survey house did in
22 terms of deciding upon the manner in which the
23 material would be classified.

24 MR. LINDSAY: I don't understand the
25 objection.

1 MR. REINER: For example, the survey house
2 was charged with the responsibility of classifying or
3 assembling data. What instructions were given to
4 them? What instructions were given to the people that
5 actually did the work? I don't know whether this
6 witness knows that.

7 MR. LINDSAY: Actually, I believe you
8 questioned the witness at the prior session of his
9 deposition, and we will place the same stipulation at
10 the end of this record.

11 MR. REINER: This particular testimony does
12 not have the foundation, which I think is required for
13 this testimony. But let's just go on. My objection
14 is on the record.

15 THE WITNESS: I'll point out that there was
16 no judgment that was applied by the interviewers in
17 classifying a response, except to hear a word and to
18 write the verbatim answers. There was no judgment for
19 ~~their~~ ^{that} exercise. The only instruction that was given
20 as to the aggregation of the data was with respect to
21 the questions that you see ~~appear~~ ^{appearing} here as to the yes
22 or no, and that you can verify for yourself that they
23 were or were not correctly classified by looking at
24 the verbatim transcript that appears at the end.

25 So if there's any question about whether

1 that execution was conducted properly, then one or
2 one's expert can easily test the accuracy of my
3 representation that no judgments were made by
4 interviewers or staff at RMA.

5 BY MR. LINDSAY:

6 Q Let's go through Tab 7 just for clarity of our record
7 and for ease of understanding of the reader of this
8 transcript. Page one at Tab 7 of Ross Exhibit 1
9 consists of instructions to the interviewer, is that
10 correct?

11 A Yes. In part, yes.

12 Q And continuing on to page two?

13 A Yes.

14 Q And then about halfway down page two there appears "Q:
15 Hello"?

16 A Yes.

17 Q Now, is that where the actual questions being asked
18 begins?

19 A Yes. As to what we ordinarily categorize as the main
20 questionnaire, yes.

21 Q So the text below the "hello" is the first question or
22 comments that would be made by the interviewer to the
23 telephone respondent?

24 A That's correct.

25 Q Now, moving on to I believe page four, approximately a

1 third of the way below the page, there's a question as
2 to age?

3 A Yes.

4 Q And below that, about 10 lines below that, there is a
5 line that begins, "I'm going to say some terms." Do
6 you see that?

7 A Yes.

8 Q What is that material?

9 A Well, it's part of the continuation of the
10 questionnaire if a respondent had previously satisfied
11 the age requirement, the next birthday question that
12 was the method for selecting the respondent.

13 If that person were available in the
14 household to speak to, then where you're pointing now
15 is the first substantive question that would have been
16 asked as it relates to the issue here, except, as I
17 pointed out, that they might not hear that the term
18 "American Indian" -- I'm sorry. They may or may not
19 -- let me take that back. That question was the same
20 that everybody got, but it's on the next page where
21 the randomization begins.

22 Q Are you referring --

23 A The next question, which is identified as 3A.

24 Q Okay.

25 A So everybody got asked the question that reads, "I'm

1 going to say some terms which you might hear someone
2 say when referring to an American Indian person. One
3 or more of these terms may be offensive to you when
4 you hear it used. Or none of them may be offensive to
5 you. Or you may have no opinion one way or the other.
6 Whatever you think is what I'd like know to."

7 Everybody heard that as kind of a setup or
8 explanation of what they were supposed to be doing,
9 and then the following question would have appeared in
10 equal proportions for the use of the name "Native
11 American" as opposed to "buck" and the other terms
12 being asked about.

13 Q So at some point all of the respondents were asked
14 about what appears as Question 3A with respect to
15 Native Americans?

16 A Yes.

17 Q And they were all asked questions regarding the
18 remaining terms, which were buck, brave, redskin,
19 Injun, Indian?

20 A And squaw.

21 Q And squaw?

22 A Yes. I should also point out that as the question
23 appears on page --

24 Q Excuse me. Before you continue with that, the order
25 in which each of those terms was asked about as to a

1 particular respondent may not have been the same?

2 A It certainly was not the same. It was by design
3 randomized, so that the order and permutation of each
4 of those terms would have been as they would be
5 generated by a random digit procedure in the computer.

6 And then I was going to say that it's also
7 true, if you look at the way the question appears, the
8 first substantive question, "Would you yourself be
9 offended by the term Native American if you heard that
10 term being used to describe an American Indian person,
11 or would you not be offended? Or don't you have an
12 opinion one way or the other about that?" The first
13 two parts of that sentence were rotated as well.

14 So that some people heard "Would you not be
15 offended or would you be offended?" And some heard,
16 "Would you be offended or would you not be offended?"
17 So that we would not be suggesting a particular
18 response in the way that that was presented to them.

19 MR. REINER: Objection. Move to strike
20 the testimony.

21 BY MR. LINDSAY:

22 Q Let's proceed then in the manner in which the
23 questions are physically laid out at Tab 7. After
24 what appears as Question 3A, there appears "Q3AA." Do
25 you see that on page five?

1 A Yes.

2 Q What was that?

3 A If a respondent said that they would be offended, they
4 were asked why they said that and then a follow-up
5 question, "Any other reason or reasons you say that?"
6 And that was asked of each respondent who gave an
7 affirmative answer to any one of the terms that he or
8 she was presented with.

9 Q The next question is Q4A on page five, beginning --
10 well, again, this is with respect to Native Americans,
11 but this begins whether you would be offended and
12 asks, "Do you think that the term Native American
13 being used to describe a Native American person would
14 be offensive to others? Or do you think it would not
15 be offensive to others? Or don't you have an opinion
16 one way or the other about that?" Do you see that?

17 A Yes.

18 (Off the Record.)

19 BY MR. LINDSAY:

20 Q You've described a method of rotation of questions.
21 When in that method of rotation of questions would Q4A
22 have been asked?

23 A Well, Q4A would always follow its matched term in the
24 prior question. So that if Question 3A asked about --
25 I'm sorry. If the prior question asked about whether

1 the respondent would be offended by that term, then
2 the following question would ask whether or not they
3 think that that term would be offensive to others. It
4 would be the same term. Those two questions were kept
5 together. They're linked for that purpose.

6 So the follow-up question would always be
7 about the same term, but asked, as you read the
8 question, in the context of whether the person would
9 think that it might be offensive to others or not.

10 And again, if the respondent indicated that
11 he or she thought it would be, then they were asked
12 the follow-up, "Why do you say that? Any other reason
13 or reasons that you say that?"

14 Q Is the same true for the other matched pair questions
15 -- for example, Q5A concerning "buck" and Q6A also
16 concerning "buck"?

17 A Yes.

18 Q If you would please turn to page 13 at Tab 7 of Ross 1
19 --

20 A (Witness complies.)

21 Q In the lower third of that page there appears Question
22 Q Text B. Do you see that?

23 A Yes.

24 Q And is that the version of Q Text A appearing at page
25 four?

- 1 A It's the alternate version.
- 2 Q The alternate version with the rotation within --
- 3 A It's the rotation. A and B refers to the rotation
4 forms to the question. So this shows you the switch
5 in that procedure. Yes, it's a rotation.
- 6 Q And then following that there are a series of
7 questions that are marked, for example, Q3B, which
8 concerns the term "Native American." Is this simply
9 the alternate version of the questions that would
10 follow if the individual respondent were asked Q Text
11 B rather than Q Text A?
- 12 A Yes. This one starts out with "not be offended,"
13 whereas is Q Text A starts out with "would be
14 offended."
- 15 Q If you could turn to page 22 at Tab 7, at the bottom
16 of the page there appears Q17?
- 17 A Yes.
- 18 Q Who was asked that question?
- 19 A Everyone would have been asked that question. Each of
20 the respondents.
- 21 Q So regardless of whether they were asked Q Text A in
22 the A series of questions or Q Text B in the B series
23 of questions, they were all asked Q17?
- 24 A Yes.
- 25 Q And then the remainder of the questions on that

1 exhibit?

2 A Yes.

3 Q Who prepared the substance of the questions that
4 appear on Tab 7?

5 A I wrote all of these questions, if by "substance" you
6 mean the content of the questions.

7 Q Right. I'm not asking who prepared the particular
8 typescript that appears at Tab 7.

9 A Right.

10 Q But who prepared the questions that were asked?

11 A I did.

12 Q In framing the questions, you've used the words
13 "offensive" and "offended." For example, in pages
14 four and five in Question Q3A, the question asks,
15 "Would you yourself be offended?" and Question Q4A,
16 "Whether or not you would be offended, do you think
17 that the term American Indian being used to describe
18 an American Indian person would be offensive to
19 others," etc.

20 A Yes.

21 Q Why did you choose the words "offended" and
22 "offensive"?

23 A I chose the word "offended" and the word "offensive"
24 because I felt that that those two words were the most
25 understandable terms that might be presented to

1 consumers to tap their state of mind with respect to
2 the terminology, the intention and the meaning of the
3 terminology, and the relevant legal standard
4 definition of the concepts of scandalous and
5 disparaging -- words which in and of themselves are
6 not words that have as general an understanding
7 certainly in the population.

8 I didn't want to use words which would be
9 too broad in the sense of, in effect, inviting people
10 to provide an affirmative response simply because they
11 thought the word was negative. I wanted to use
12 something stronger. I felt that "offensive" will
13 capture the meaning of kind of the emotional feeling
14 that you might have when you're asked to react to
15 something, and that would go beyond some negative but
16 perhaps less stringent term to tap that understanding.

17 It was the best word, I thought, based upon
18 my understanding of the issue, as you and your
19 colleague discussed it with me when we met.

20 Q In your professional opinion, is the questionnaire
21 biased in any fashion?

22 A No. It doesn't invite one way or the other responses,
23 and it's constructed in a way which provides
24 comparisons to be made among terms, at least one of
25 which was intentionally included to be a term which

1 was not or should not reasonably be viewed as
2 offensive.

3 Q What term was that?

4 A Native American.

5 Q Now, if you could turn back to Tab 4 in Ross Exhibit
6 1, could you please tell us what appears behind that
7 tab?

8 A Yes. This is the parallel screen print of what the
9 interviewer would have seen in administering the
10 version of the questionnaire for a Native American
11 respondent, or for one who turned out to be a Native
12 American respondent on the basis of the question
13 sequence.

14 So it is the same as the other
15 questionnaire that we have been discussing, except
16 that it has portions which are designed specifically
17 to determine whether the respondent was or was not an
18 American Indian person. So that difference appears at
19 Q2 on page four.

20 Q And Question 3 as well?

21 A Yes.

22 Q Question 4 on page five as well?

23 A Yes.

24 Q And is the questionnaire otherwise essentially the
25 same?

1 A Yes.

2 Q You've described methods of rotation with respect to
3 the general study. Was the same method of rotation
4 used in the Native American study?

5 A Yes.

6 Q Who prepared the questions that are reflected in the
7 questionnaire at Tab 4?

8 A I did.

9 Q In your professional opinion, is the questionnaire
10 that appears at Tab 4 biased in any way?

11 A No.

12 Q Once the questioning was completed, did you receive
13 any reports as to the results of the questioning?

14 A Yes.

15 Q Could you please identify for our record what appear
16 at Tabs 5, 6 -- well, let's start with Tabs 5 and 6.

17 A Tab 5 at the upper left has "Ross Native Urban" and
18 Tab 6 says "Ross Native Rural." These each describe
19 the sampling characteristics of my efforts to get to
20 the urban and the rural subcomponents, if you will, of
21 the general Native American population.

22 These tabs identify the total number of
23 telephone numbers made available for interviewers to
24 use. It identifies the number of callbacks made to
25 talk to the appropriate person in the household, and

1 then chose the disposition of each of the calls with
2 respect to its status, as to what happened -- was it a
3 completed interview? Was it not? And if not, for
4 what reason?

5 The rest of these two tabs are essentially
6 sampling detail provided by the survey sampling
7 company called Survey Sampling that generated the
8 numbers that were used by Robinson & Muenster for the
9 survey. It identifies the specific area codes that
10 were the basis for the draw. And so that if you look,
11 for example, at the second page one in Tab 5 --

12 Q About halfway through?

13 A About halfway through, after a blank page which
14 follows page five, you will see a list of area codes
15 and exchanges for particular areas within states and
16 counties sampled. So, for example, Tuba City,
17 Arizona, T-U-B-A, is the first listed area code and
18 exchange that was drawn into the sample, and so on.

19 You can see the total list of area codes
20 and exchanges on page four that show the proportion of
21 the total sample that was drawn from each of those
22 areas and what percentage of the market, incidentally,
23 each of those exchanges represented. The same is true
24 in parallel for what's in Tab 6, for what I call the
25 rural population, in my effort to make sure that we

1 didn't end up with over-representing either rural or
2 urban, but in fact had an intention to reflect both in
3 the sampling procedure -- in fact, in effect, in this
4 rural section, being sure that we were talking about
5 rural as opposed to urban areas by looking at the name
6 of the area code and identifier against a map, to make
7 sure that we were talking about rural areas within
8 those states that were selected.

9 And so the resultant list of rural areas in
10 Tab 6 that were used in the survey appears at page
11 five, starting with Shannon, North Dakota, for
12 example, and then going down the list.

13 Q Okay. So Tabs 5 and 6 relate to the survey of Native
14 Americans, is that correct?

15 A Yes. I should have said that page seven, it's just a
16 re-alphabetizing of all of those. For the rural, it
17 starts with Apache, Arizona, and goes down to Todd,
18 South Dakota. Those were the 50 -- we require that
19 there be 50 for the rural and 50 for the urban. This
20 is the list of the 50 for the rural.

21 Q What appears at Tab 8?

22 A Tab 8 is the parallel information for the general
23 population portion of the sample. It is different
24 only in that it does not have an urban and rural split
25 as a quota in the sampling procedure. It lists each

1 of the states. And all of the states in the 48
2 contiguous states ^{were} represented, ^{It} in ~~it~~ shows for each of
3 those states, and for each analogous location within
4 the states the number of interview numbers that were
5 drawn and put into the computer for the execution of
6 the sample.

7 Q What appears then at Tab 9?

8 A Tab 9 is the verbatim transcription of the answers
9 recorded for the general population portion of the
10 survey. When I say "verbatim," I mean what was typed
11 in by the interviewer into the computer to indicate
12 the respondent's sex and age and race and what they
13 said with respect to each of the questions -- anything
14 that was entered into the computer, what that entry
15 was for each and every one of the respondents.

16 Again, for convenience purposes, to aid the
17 reader's ability to comprehend the structure of the
18 appendix, the order in which the terms are listed is a
19 standard fixed order, even though, as I've discussed,
20 the actual presentation was randomized. So "Native
21 American" always comes first in the way that these
22 answers are typed out.

23 Q So, in other words, just for the convenience of the
24 reader, the questions are listed in the same order in
25 the verbatim transcript as they are listed in the

- 1 questionnaire?
- 2 A Right.
- 3 Q Even though, in fact, they were randomized and asked
- 4 in a different order for any given respondent?
- 5 A Yes. They would have been asked in a different order
- 6 for most of the respondents, but this would be the
- 7 unrotated response given by each of the respondents to
- 8 these questions.
- 9 Q Looking at page one of Tab 9, just to go through an
- 10 example, there appears at the top in the left-hand
- 11 column an ID followed by a number. Do you see that?
- 12 A Yes.
- 13 Q And that number is 1,000? Or excuse me. That's
- 14 actually --
- 15 A It's actually 100,000.
- 16 Q That's the identification number for a particular
- 17 respondent?
- 18 A Yes. That's the assigned number in order to
- 19 subsequently be able to be identify and distinguish
- 20 that respondent from each other respondent in the
- 21 survey.
- 22 Q And then there appear a series of questions going down
- 23 through Q18, which lists age?
- 24 A Yes.
- 25 Q Q18 would be the end of the report as to respondent

- 1 No. 100,000?
- 2 A Yes.
- 3 Q And then in the left-hand column below that there
- 4 appears ID No. 100,001?
- 5 A Yes.
- 6 Q And then below that there appear the same series of
- 7 questions ending with Q18?
- 8 A Yes.
- 9 Q And that would be the complete report for respondent
- 10 100,001?
- 11 A Yes.
- 12 Q And then we would go to the right-hand column of the
- 13 page and would see respondent No. 100,002?
- 14 A Yes.
- 15 Q And continuing on in that same process?
- 16 A Yes.
- 17 Q Now, just so we're clear, could you also turn to page
- 18 two? In the lower left-hand corner, approximately 23
- 19 lines down, there appears ID No. 100,005?
- 20 A Right.
- 21 Q And below that is series of questions which then
- 22 continue into the right-hand column?
- 23 A Yes.
- 24 Q So, in that case, the report for that particular
- 25 respondent goes from one column to the next column?

- 1 A Yes.
- 2 Q At the bottom of that page in the right-hand column,
3 four lines up from the bottom there appears respondent
4 No. 100,007?
- 5 A Right.
- 6 Q And that respondent continues on to the next page and
7 ends on page three at Q18, is that correct?
- 8 A Yes.
- 9 (Off the Record.)
- 10 BY MR. LINDSAY:
- 11 Q To take an example, if you could, why don't we take
12 page two of Tab 9? To go through the questionnaire
13 for a given respondent, let's take where we left off
14 -- respondent No. 100,007.
- 15 A Okay.
- 16 Q That particular respondent is identified as a female?
- 17 A Yes.
- 18 Q And when asked, stated that she was over age 16?
- 19 A At least 16.
- 20 Q Excuse me. At least 16. So 16 or older?
- 21 A Yes.
- 22 Q And then regardless of the fashion in which this
23 particular respondent was asked the questions, they
24 are listed in the same order for each respondent?
- 25 A Yes.

1 Q So at some point in the questioning she was asked
2 Question Q3 in either the Q3A version or the Q3B
3 version?

4 A Correct.

5 Q And was asked about the words "Native American"?

6 A Yes.

7 Q And the response that she gave to that question was
8 that she would not be offended?

9 A Yes.

10 Q Continuing on to page three, she was asked either Q4A
11 or Q4B and stated that "Native American" would not be
12 offensive to others?

13 MR. REINER: That's not what it is.

14 BY MR. LINDSAY:

15 Q I'm sorry. Q4.

16 A Q4. "Would not be offensive to others."

17 MR. REINER: Referring to Native American
18 Indians.

19 BY MR. LINDSAY:

20 Q Referring to the phrase "Native American."

21 A Referring to the phrase "Native American."

22 Q Right. The exact text of the question appears in the
23 questionnaires that we've already discussed, correct?

24 A Right.

25 MR. REINER: I just wanted to make sure the

1 question was clear on what you're talking about. It
2 wasn't clear to me listening to it, and I just wanted
3 to make sure the record is clear. I am not objecting
4 as to form of the question or things like that. I'm
5 just trying to get a clear record here.

6 BY MR. LINDSAY:

7 Q The next question is Q5 as to the word "buck,"
8 correct?

9 A Actually, that's Q6. I'm sorry. Q5. Yes. I'm
10 looking at the wrong -- Q5 appears more than once,
11 yes. It's the continuing series of questions about
12 the same term.

13 Q So the first instance of Q5 was as to the word "buck"?

14 A As to the whether the respondent himself or herself
15 would be offended.

16 Q And this respondent answered that she would be
17 offended?

18 A That's correct.

19 Q And so she was asked a follow-on question to Q5?

20 A Yes.

21 Q And gave an answer?

22 A Yes.

23 Q And that answer is then reflected to the right of Q5?

24 A Yes.

25 Q And her answer was, "I just think we're Americans.

1 Whether you're an Indian or whatever, we're just all
2 Americans"?

3 A Right.

4 Q And then this respondent was asked a further follow-on
5 question, "Any other reasons?" or whatever the
6 question actually was from the questionnaire?

7 A That's correct.

8 Q And her answer is listed as "DK." Is that "don't
9 know"?

10 A "Don't know." It means "don't know."

11 MR. REINER: What question number is that
12 again?

13 THE WITNESS: Question 5.

14 MR. REINER: Excuse me. The respondent
15 number.

16 MR. LINDSAY: 100,007.

17 BY MR. LINDSAY:

18 Q And then whether or not it was this particular order,
19 at some point she was asked the question about "buck,"
20 is that correct?

21 A Yes.

22 Q And that's reported here as Q6?

23 A Well, she was asked about the term "buck" as to
24 whether or not it would be offensive to others. She
25 was already asked about "buck" with respect to whether

1 it would be offensive to her.

2 MR. REINER: Excuse me. You're referring
3 back to the question not the way it's characterized
4 there, correct? I just want to --

5 THE WITNESS: Yes.

6 MR. REINER: All right. So that's not the
7 question. That's just a characterization phrase
8 there?

9 THE WITNESS: I'm making a distinction
10 between what she said about her own view as opposed to
11 her view of what others would have been. I'm
12 characterizing.

13 MR. REINER: Excuse me. I don't want to
14 interrupt here. I'll straighten it out in cross.

15 BY MR. LINDSAY:

16 Q So, having been asked Q5 about "buck" and the
17 follow-on questions, she was next asked Q6, about
18 "buck," and then the follow-on question?

19 A Yes.

20 Q Then similarly, two questions, Question 7 and Question
21 8, as to "brave"?

22 A Yes.

23 Q And then at some point in her questioning she was
24 asked Q9 as to "redskin"?

25 A Yes.

- 1 Q And here she was reported as saying she would be
2 offended?
- 3 A Yes.
- 4 Q And then she was asked the follow-on question, "Why?"
5 or whatever the exact text of the question is, and her
6 answer was, "We're all Americans and I don't think we
7 should be put in different categories like that"?
- 8 A Right.
- 9 Q And then she was asked the follow-on question of
10 whether she had any other reasons?
- 11 A Yes.
- 12 Q And then she was asked Q10 also as to "redskin"?
- 13 A Yes.
- 14 Q And her answers are reported in the report?
- 15 A Yes.
- 16 Q And then so on for the remainder of the questions
17 going through Q16, is that correct?
- 18 A Eighteen. Well --
- 19 Q Excuse me. Q3 through Q16 were asked in the
20 randomized order, is that right?
- 21 A Right.
- 22 Q And then she was asked Q17 and Q18 at the end?
- 23 A Yes.
- 24 (Short recess was taken.)
- 25 BY MR. LINDSAY:

1 Q I take it, Dr. Ross, that you actually received copies
2 of the verbatim transcripts from Robinson & Muenster?

3 A Yes.

4 Q Were the results of the survey tabulated in any way?

5 A Yes.

6 Q How were they tabulated?

7 A By machine. Giving the punching stations that were
8 identified at those appropriate places in the
9 administration of the interview, the computer was
10 effectively requested by a program instruction to run
11 a frequency distribution on the number and therefore
12 the percentage who gave various answers to the
13 questions of primary interest to this case. Those
14 appear as Tab 2.

15 Q Please tell us what appears at Tab 2.

16 A Tab 2 is the primary result table. It answers only to
17 the closed and structured questions. There's no
18 interpretation here as to the code entry. The
19 interviewer recorded "yes" or "no" or "no opinion" in
20 response to the questions that I'm characterizing in
21 the questionnaire as asking whether the respondent
22 himself or herself would be offended and/or if that
23 respondent felt that others would be offended by that
24 term.

25 It shows in the top third table looking at

1 the left-most column, headed "General Population
2 Sample." It shows in that first top third the
3 percentage number and percentage of respondents who
4 said either that the term would be offensive to them
5 and/or said that the term would be offensive to
6 others. The person wasn't counted twice, but if the
7 person was offended either to himself or herself
8 and/or thought that the term would be offensive to
9 then, then that person was counted once.

10 So the top third of the table shows, for
11 example, with respect to the first term shown there,
12 "Injun," there were 301 respondents in total who were
13 asked this question in the general population sample
14 and 218, or 72.4 percent, that said they would either
15 be offended by the term or that they had thought the
16 term would be offensive to others.

17 The remainder, of course, then said "no" or
18 "no opinion," and so forth for each of the other
19 terms. The middle third shows the breakout of just
20 those who said that the term would be offensive to
21 themselves, and then the bottom third just those who
22 said it would be offensive to others. So, by
23 definition, the top third of the table shows a higher
24 number than would the middle or bottom third because
25 it's the counting of one or the other.

1 The right-hand side of the page is exactly
2 the same except that it reports answers for the Native
3 American sample. The base shown there is 358, which,
4 as I think I've said before, includes some people who
5 identified themselves as Native Americans, even though
6 they did not identify themselves as tribal members.

7 Q For clarity sake, let me postulate three people.

8 Person A says that the word "Injun" would be offensive
9 to himself but not offensive to others. So that
10 person would be listed in the third question as saying
11 offensive to -- excuse me. Let me back up. Person A
12 would be included among the 72 percent in the
13 "offensive to you" and/or "offensive to others"?

14 A Yes.

15 MR. REINER: Objection. Grounds for an
16 incomplete hypothetical. The questionnaire was not
17 whether someone was offended by the term but if
18 offended if the term referred to a Native American
19 Indian person. So that just that's the basis for my
20 objection.

21 MR. LINDSAY: That's fine. And all I'm
22 trying to do is make sure that we understand how a
23 person would be reported.

24 BY MR. LINDSAY:

25 Q So, if the person said offensive to you but not

1 offensive to others, that person would be included in
2 the offensive to you and/or others?

3 A Yes.

4 MR. REINER: Objection. It's the same --

5 MR. LINDSAY: I'm not trying to mimic the
6 exact question. I'm simply trying to make sure that,
7 you know, whatever the question was, once we have the
8 answer -- let's just --

9 MR. REINER: All right. Just so the
10 record's clear.

11 BY MR. LINDSAY:

12 Q The person having responded that the word is offensive
13 to him or her would also then be included among those
14 who in the middle third of the page listed as
15 responding offensive to you would be included in that
16 "yes" for that question?

17 A Yes.

18 Q But would not be included in the "yes" to the
19 offensive to others?

20 A That's correct.

21 Q And then it would be just the opposite for Person B?
22 If Person B said the term is not offensive to him or
23 her but is offensive to others, Person B would be in
24 included in the offensive to you or others -- would
25 not be included in offensive to you but would be

- 1 included in offensive to others?
- 2 A Yes.
- 3 Q In answering yes to those questions?
- 4 A Yes.
- 5 Q Person C who says that the term is offensive to him or
- 6 her and is offensive to others is included both as
- 7 answering yes in both the middle third of the page of
- 8 Tab 2 and in the bottom third, is that correct?
- 9 A Yes.
- 10 Q And is included but only once in the top third of the
- 11 page?
- 12 A Yes.
- 13 Q So there's no double counting of that person?
- 14 A That's correct.
- 15 Q One further explanatory note. In order to look at the
- 16 raw data, for example, for the word "Injun" in the
- 17 general population survey, we would then turn to the
- 18 questionnaire to find the exact questions that were
- 19 asked, is that correct?
- 20 A Yes.
- 21 Q And we would turn to the verbatim, which for the
- 22 general survey appears at Tab 9?
- 23 A Right. And the questionnaire that they would have
- 24 been asked would appear at Tab 7.
- 25 Q So, for example, the word "Injun" is a shorthand

1 version of referring back to the questions that asked
2 about the word "Injun"?

3 A Yes.

4 Q And looking at Tab 9 for the verbatim, those would
5 appear at Q11 for offensive to himself or herself and
6 Q12 for offensive to others?

7 A Yes.

8 Q Have you formed any opinions as to whether the general
9 survey to which you have testified fairly represents
10 the attitudes of the general American population?

11 MR. REINER: Objection. In what context?

12 BY MR. LINDSAY:

13 Q With respect to the questions that were asked of the
14 sample.

15 A Yes.

16 Q And what is that opinion?

17 A That the methodology was a fair and accurate way to go
18 about measuring the opinions.

19 Q Have you formed any opinions as to whether the survey
20 results for the Native American survey represent the
21 views of the Native American population of the United
22 States?

23 MR. REINER: Objection.

24 BY MR. LINDSAY:

25 Q With respect to the questions that were asked.

1 A Yes.

2 Q And what is that opinion?

3 A That the questionnaire and the methodology fairly
4 represent that opinion.

5 Q Why was the word "Injun" included in the
6 questionnaire?

7 A Well, my initial hypothesis was that it would be the
8 most or among the most objectionable term when in the
9 context of the questionnaire as to perceived
10 offensiveness because it seemed to be an example of
11 quite an extreme, in my view, a stereotypical example
12 of a pejorative term.

13 I wanted to represent a range, and my
14 initial reason for putting it in there was that I
15 expected it to be at the high-end range, just as I've
16 said that "Native American" would be at the low-end
17 range.

18 Q Now, from the tabulation appearing at Tab 2 within the
19 general population responding affirmatively to the
20 questions concerning the word "Injun," it was 218
21 persons or 72.4 percent of the 301 who were
22 questioned?

23 A Affirmative in the sense that they perceived the --
24 that they responded to the relevant questions
25 concerning "Injun" either one or the other

1 affirmatively.

2 Q And also in the general population sample, the number
3 of persons responding affirmatively with respect to
4 the questions concerning "Native American" was 14 or
5 4.7 percent of the 301 persons actually questioned?

6 A That's correct.

7 Q Were there any percentages higher than the percentage
8 for "Injun"?

9 A No.

10 Q And were there any percentages lower than for the term
11 "Native American"?

12 A No.

13 Q Is there any significance to the range, then, from 4.7
14 percent to 72.4 percent?

15 A Well, the significance of the range is really to
16 reflect what would be kind of a -- I would
17 characterize it as kind of a noise level at the bottom
18 end, where people would say essentially anything would
19 be offensive. That's if you take the premise that
20 "Native American" as it stands would not or should not
21 reasonably be thought of as an offensive term as a per
22 se kind of an issue.

23 The top end is reflective of kind of a
24 ceiling, at least in terms of what words I was aware
25 of, that would be in the common vernacular that would

1 be understandable to Americans that might be used in
2 describing an Indian person as the most extreme.

3 And so it represents a range in the sense
4 that it is -- that it exemplifies where other terms
5 would fall along a continuum of not offensive or not
6 meaningfully offensive on the one extreme to, on the
7 other extreme, high or very offensive. So it does
8 have that character as a range.

9 Q Dr. Ross, do you have an understanding of the word
10 "scandalous," an understanding for purposes of these
11 proceedings?

12 A I have an understanding, yes.

13 Q What is that understanding?

14 MR. REINER: Objection. No foundation laid
15 as to the source of that understanding.

16 BY MR. LINDSAY:

17 Q Well, regardless of the source, I take it you have an
18 understanding, is that correct?

19 A Yes.

20 MR. REINER: Object to the question. No
21 foundation has been laid.

22 BY MR. LINDSAY:

23 Q What is your understanding?

24 A My understanding was that the term "scandalous" is
25 intended to describe a word which would in the general

1 population, broader population, be viewed of as being
2 from a behavioral point of view offensive.

3 The word "scandalous," as I understand the
4 articles that I read, and I think that I provided or
5 that were provided at the first deposition and the
6 conversations that I had with you, led me to feel that
7 the word "offensive" was the best exemplar word to tap
8 that state of mind. That "scandalous" was intended or
9 might well have reflected when the statutory language
10 was written, whenever it was written -- years ago --
11 and where "scandalous" may have had a different
12 meaning to the writer than it does today.

13 Q Have you formed any opinions as to whether the word
14 "redskin" is scandalous?

15 A Yes.

16 MR. REINER: Objection.

17 BY MR. LINDSAY:

18 Q What opinions have you formed?

19 MR. REINER: Objection.

20 THE WITNESS: Well, I state them in my
21 report. I can just say that I formed the opinion that
22 it is scandalous. It's very high on this range. We
23 can turn to the particular page. On Tab -- well, I
24 guess non-tab --

25 BY MR. LINDSAY:

1 Q You're referring now to your postscript that appears
2 before or in advance of Tab 1 of Ross Exhibit 1, is
3 that correct?

4 A Yes. And I state there that I have the opinion that
5 the word "redskin" is scandalous based upon the
6 survey; that it means offensive to a substantial
7 composite of the American public. And I'm quoting
8 that language as I understood the issue to be
9 translated into an instrument which purported to
10 measure that state of mind.

11 I explained in the report the magnitude of
12 the percentage of the general population who perceived
13 offensiveness, as I measured it in the survey, to be
14 high and to ^{either} ~~neither~~ exceed comparable percentages --
15 which it's been my experience in applications of
16 measurements of states of minds of consumers to
17 litigation issues such as trademark confusion, ^{and}
18 secondary meaning, to have met or exceeded any of
19 those benchmark percentages which would be ordinarily
20 considered as a sufficient standard through the review
21 of the decisions made by various courts and
22 adjudicative bodies, regulatory bodies, who concern
23 themselves with those kinds of concepts of false
24 advertising or trademark confusion or secondary
25 meaning.

1 Q Let me ask for a bit further information on that.
2 When you say percentages are high, are you referring
3 to the affirmative responses to the questions
4 concerning the word "redskin"?

5 A Yes. The fact that 71.1 percent of the general
6 population reacted to the questions in a way which
7 reflected that they themselves or that others would
8 react in an offended way to the term, that 71.1
9 percent again is a high number absolutely, clearly, in
10 my view and certainly relative to the 72.4 percent for
11 "Injun," which, as I say, was put into the survey to
12 be reflective of that very extreme -- the most extreme
13 that I thought was available to measure the term to
14 represent the extreme end of the offensive end of the
15 scale.

16 And I also explained why that number is
17 still high and significant if it's considered
18 separately -- that is, for those that considered the
19 word "offensive" to themselves personally.

20 Q That's the 46.2 percent?

21 A Yes. Or to the 55.8 percent who considered it
22 offensive to other persons.

23 Q Why did you ask the questions separately -- offensive
24 to oneself and offensive to others?

25 A Frequently it's the case in measuring public opinion,

1 especially in areas where there is some degree, or
2 some obvious degree as it would be in this case, to
3 sensitivity that people might have to admitting or
4 reflecting concern that they themselves might have
5 with some issue that you're asking them about.

6 One way to get a measurement of that true
7 feeling is to take their own ego and their own self,
8 if you will, out of the question, but to ask them that
9 question about others, what others would say or think
10 or do, and use that as a measure of their feeling.

11 Sometimes people will represent that they
12 are sort of above it. They might not be concerned or
13 that they wouldn't do something evil or whatever, but
14 that their neighbor might. That's the well-accepted
15 kind of an approach of indirect measurement to sort of
16 get at what they really think about that topic, you
17 know, in a way that gets around that defense mechanism
18 of social desirability response.

19 And I've used that kind of approach before,
20 and it's pretty standard in measuring anything in a
21 sensitive issue.

22 Q In your professional judgment, is it appropriate to
23 combine in the fashion that you've done -- and without
24 double counting, but is it appropriate to combine the
25 offensive responses to the offensive to self and

1 offensive to others questions?

2 A Yes.

3 MR. REINER: Objection.

4 THE WITNESS: They're both essentially the
5 same question. They are separate questions only
6 mechanically. They are designed to measure whether or
7 not a person does or doesn't have a reaction of
8 offensive or being offended to that term. I also
9 would point out that the breakdown of that kind of a
10 question approach, since it is true that all of the
11 terms asked about were measured in quite the same way,
12 including "Native American," that the fact that
13 "Native American" as a term is in the study, there's
14 been an opportunity to make sure that we're not
15 constructing a question structure in a way that
16 combining the answers to those create an unreasonably
17 high number, i.e., evidence that there's something
18 very suspicious about the validity of the study that
19 we've conducted.

20 Q Now, you referred a few moments ago to analogous areas
21 in which you have conducted surveys. What do you mean
22 by that?

23 A Well, one of the first ones where that approach was
24 used was in a case that we were doing under a federal
25 contract for fallout shelter work where it was related

1 to -- well, the question of what Americans would or
2 wouldn't do with respect to letting their neighbors
3 into their fallout shelter was considered by some
4 government agencies to be a relevant question to have
5 in terms of forecasting public reaction in case of a
6 nuclear war or whatever.

7 And to ask people the simple question of
8 what they would do if somebody tried to get into their
9 fallout shelter was very clear from pretesting to
10 yield a very different answer than asking people what
11 they thought ^{their neighbors} would do ~~themselves~~ if they were trying
12 to get into their fallout shelter. They had a very
13 much different answer. So, the question was asked
14 both ways, and then aggregate ^{to} ~~or~~ come up with an
15 estimate of what likely problems would occur in terms
16 of people trying to shoot one's neighbor and get into
17 their various fallout shelters. So we ask the
18 question both ways. The concept is quite common.

19 Q I'd like to turn to some of the other areas of
20 litigation which you have conducted. Have you
21 conducted surveys relevant to questions of the
22 likelihood of confusion or actual deception?

23 A ^{Likelihood} ~~Unlikelihood~~ of confusion, yes. Well, likelihood of
24 deception, I guess, yes.

25 Q Are you familiar with such surveys?

1 A Yes.

2 Q Have you formed any view with respect to the kind of
3 responses that are sufficient to show that a
4 particular advertising is likely confuse the public?

5 A Generally, yes.

6 Q What views have you formed?

7 A Well, the views that I formed are really reflective of
8 what I understand, you know, courts do. At least 15
9 percent is pointed to by many courts as a frame of
10 reference as a minimum showing of deception or
11 confusion as the case may be before the courts would
12 consider that to be an actionable level of deception
13 or confusion.

14 Q And is that matter addressed in your report?

15 A Yes.

16 MR. REINER: Objection.

17 BY MR. LINDSAY:

18 Q Where is it addressed in your report?

19 MR. REINER: Objection.

20 THE WITNESS: It's addressed at page six of
21 at 3A, sub one.

22 BY MR. LINDSAY:

23 Q Now, in addition to that area, have you also
24 considered the issue of generisism in trademark
25 matters?

1 A Yes.

2 Q And are you familiar with studies conducted in that
3 area?

4 A Yes.

5 Q Have you any views as to levels of responses that are
6 usually considered relevant in such matters?

7 MR. REINER: Objection. There's no
8 foundation laid as to what this witness understands as
9 to generisism.

10 BY MR. LINDSAY:

11 Q What is your -- actually, before we do that, I
12 believe, Dr. Ross, you pointed out to me earlier this
13 morning that there was a typographical error at pages
14 six and seven of your report?

15 A Yes. I had intended that the term "secondary meaning"
16 be employed rather than the term "generisism,"
17 although one could use the term "generisism" and talk
18 about non-generisism. But it would be more accurate
19 for me to simply substitute the words "secondary
20 meaning" for "generisism" to connect with the
21 percentages that I've listed there -- if the sentence
22 on page six, 3A sub 2, said the analogous issue of
23 secondary meaning in trademark litigation, etc., and
24 at the top of page seven said that population is
25 usually sufficient to the conclusion that a particular

1 word has achieved secondary meaning.

2 Q Or instead of generic --

3 A Non-generic. Not nearly as descriptive as the case
4 may be. And I would make the same parallel change on
5 the page nine of the same document.

6 MR. REINER: Where are you referring to?

7 THE WITNESS: Page nine, at paren two.

8 BY MR. LINDSAY:

9 Q Now, with respect to that --

10 MR. REINER: Excuse me. Is that the only
11 place? There's two words, generisism and generic, and
12 you want to substitute "secondary meaning"?

13 MR. LINDSAY: Non-generic would be the
14 easiest way, I think.

15 THE WITNESS: Just to say non-generic for
16 purposes of the -- I think that was the nature of the
17 typo.

18 MR. LINDSAY: The last line of Item 2
19 should read "the particular word is considered
20 non-generic."

21 MR. REINER: And at the top, "generisism"
22 should be "secondary meaning" to comply with the
23 correction you have made?

24 MR. LINDSAY: Well, the shortest way of
25 making the correction, I believe, is in both cases

1 simply to make the final word "non-generic."

2 MR. REINER: That's not what Dr. Ross said.
3 That's not what he said.

4 BY MR. LINDSAY:

5 Q Well, is that in fact the shortest way of making the
6 change?

7 A Well, the word "generisism" can be left where it is,
8 because the issue of secondary meaning connects to the
9 same concept of generisism. The only thing that's
10 critical to do is to substitute the word "non-generic"
11 at the end of the sentence or the words "secondary
12 meaning" to correctly convey what I had intended to
13 convey in writing this reference of 30 to 40 percent.

14 Q Now, Dr. Ross, I believe you've testified earlier
15 today that you have from time to time conducted
16 attitude surveys outside the context of litigation?

17 A Yes.

18 Q And when you have conducted such studies, have you had
19 occasion to make recommendations to businesses with
20 respect to the results from such studies?

21 A Oh, yes.

22 Q If the survey that you conducted in this case had
23 instead been conducted in a business setting, would
24 you make any recommendations based on the result of
25 that survey?

1 MR. REINER: Objection.

2 THE WITNESS: Yes.

3 BY MR. LINDSAY:

4 Q What recommendations would you make?

5 MR. REINER: Objection.

6 THE WITNESS: As I pointed out in my
7 report, the term "redskin" would be an inappropriate
8 term to use in a business name or a trademark or in
9 any other part of the way that a company might
10 represent itself to the public. Because I would rely
11 on this survey to tell me that consumers would find
12 that that name or that word would either be a word
13 that would be viewed of as meeting the scandalous kind
14 of ^{criteria} ~~criteria~~ of being disparaging or negative in the
15 way that I measured it, or it would get to the
16 disparaging aspect as reflected in that part of the
17 survey that was done with Native Americans.

18 Either way one looked at the general
19 population or the Native American sample, the word
20 would be an inappropriate word to use because it would
21 be reacted to in a negative way by consumers.

22 MR. REINER: Objection. Move to strike.
23 Not based upon any fact. And specifically not based
24 upon the fact that a word has been used for 60 years
25 and not being earlier adopted as a trademark.

1 BY MR. LINDSAY:

2 Q Dr. Ross, you have just made reference to the word
3 "disparaging." Do you have an understanding of the
4 word "disparaging"?

5 MR. REINER: Objection.

6 THE WITNESS: Yes, generally.

7 BY MR. LINDSAY:

8 Q What is your understanding of the word "disparaging"?

9 A I would ^{refer} reflect to the particular language that I used
10 in the report.

11 Q Page eight?

12 A Page eight, E1, the phrase "may disparage" means to
13 demean or degrade an identifiable group within the
14 population. I measured that through the use of the
15 word "offensive" or "offended" in the way that we have
16 been discussing these questions, but now restricting
17 the responses given in terms of the conclusion I
18 reached to that population that was sampled and that I
19 described as the Native American population rather
20 than the general population.

21 MR. REINER: Objection. Move to strike.
22 Not based upon any scientific evidence Dr. Ross has
23 obtained.

24 BY MR. LINDSAY:

25 Q Dr. Ross, have you formed an opinion as to whether the

1 word "redskin" is a disparaging word?

2 MR. REINER: Objection.

3 THE WITNESS: Yes.

4 BY MR. LINDSAY:

5 Q What opinion have you formed?

6 MR. REINER: Objection.

7 THE WITNESS: That it is disparaging.

8 BY MR. LINDSAY:

9 Q And on what do you base that opinion?

10 A The fact that a very high percentage -- in fact, 60.3
11 percent -- of Native Americans considered that the
12 term "redskin" was offensive to them or to others, and
13 the relative magnitude of that percentage as compared
14 with the percentage who regarded "Injun" -- the
15 percentage of Native Americans who regarded "Injun" to
16 be offensive, which was 72.1 percent, and again, an
17 analogous way of making reference to the sufficiency
18 magnitudes that are ordinarily discussed in those
19 parts of litigation surveys that discuss them.

20 Except for trademark confusion and false
21 advertising and secondary meaning studies, there just
22 are no other numbers for surveys, at least that I'm
23 familiar with, as being discussed as it relates to the
24 sufficiency of a magnitude that is actionable.

25 MR. REINER: Move to strike. No foundation

1 and irrelevancy.

2 BY MR. LINDSAY:

3 Q Dr. Ross, in forming your opinions, have you
4 considered any of the follow-on responses to the
5 follow-on questions in the two surveys? By that I
6 mean the question as a follow-on to a particular word.

7 A Yes.

8 Q In what way have you considered those?

9 A I looked at the answers that respondents gave to the
10 follow-up questions as to why they said that they were
11 offended or that they thought that others would be
12 offended, in order to demonstrate sufficiency in my
13 own mind as to the conclusion that there was evidence
14 that they were taking meaning of the term in the way
15 in which I had intended that it would have reflected
16 that meaning.

17 I did not make a tabulation of the
18 percentages of who did or didn't take away one or
19 another kind of meaning in answer to that question
20 because I didn't think that was relevant to -- and I
21 still don't think it's relevant -- any conclusion as
22 to the percentage who viewed the term as offensive to
23 themselves or to others.

24 But it was simply to look at what their
25 answers were as a way to get some depth or view of the

1 feeling, a kind of feeling that people had that were
2 underlying their answers to the closed-end question.

3 Q For example --

4 MR. REINER: Move to strike.

5 BY MR. LINDSAY:

6 Q For example, on the general population study, turning
7 to page six, the first respondent on that page -- I
8 guess it continues from page five, but on page six,
9 the answer to follow-on Question 10 as to the word
10 "redskin," the response given was, "It just does not
11 give them credit for being a human being --"

12 A Right. That would be an example of the kind of range
13 of feelings that people expressed in explaining their
14 answers to that prior question.

15 Q And still in the general population at page 15,
16 respondent No. 150,010, the answer to follow-on
17 Question 10 is "derogatory statement"?

18 A Right.

19 Q Page 18, respondent 160,000 in the right-hand column,
20 the follow-on to Question 9 as to "redskin," "Because
21 the same is saying kike and nigger, and I'm Jewish"?

22 A Yes. That would be an example.

23 MR. LINDSAY: No further questions.

24 EXAMINATION

25 BY MR. REINER:

1 Q Dr. Ross, did you physically write this document
2 called "Expert Disclosure of Ivan Ross"?

3 A No.

4 Q Did you write the word --

5 MR. LINDSAY: Objection. Ambiguous. Are
6 you referring now just to the typescript portion or to
7 the material at the various tabs?

8 MR. REINER: I'm talking about the
9 typescript portion.

10 MR. LINDSAY: That appears in advance of
11 Tab 1 in the --

12 MR. REINER: That's correct.

13 BY MR. REINER:

14 Q Did you write that?

15 A No. I explained previously how that got there.

16 Q Did you review it, though, before -- strike that. Did
17 you review it for accuracy?

18 MR. LINDSAY: Objection.

19 THE WITNESS: Yes. At some point.

20 BY MR. REINER:

21 Q And you made some corrections just a few minutes ago
22 on page 10, where you substituted the word "secondary
23 meaning" for "generisism" under paragraph three, A2,
24 isn't that correct?

25 MR. LINDSAY: Objection.

1 THE WITNESS: I said it would make it
2 clearer, but it doesn't have to be substituted.

3 BY MR. REINER:

4 Q Is it your experience, then, that levels of 30 to 40
5 percent would be sufficient to have a word deemed to
6 be generic?

7 A Non-generic.

8 Q No, no. Generic.

9 A Right. That's what I said. I said that you'd have to
10 change the last part of what we had discussed to
11 either be non-generic or secondary meaning, but that
12 the first use of the word "generic" could remain that
13 way.

14 Q Right. So when you reviewed this, you didn't perceive
15 that as being --

16 A I didn't pick it up, no.

17 Q Okay. Now, when you first met with the attorney
18 retained from Dorsey & Whitney, did you have a
19 discussion of the issues involved in this proceeding?

20 MR. LINDSAY: Objection.

21 THE WITNESS: Some part of them.

22 BY MR. REINER:

23 Q Were you aware that the issue had involved the use of
24 the words "Washington Redskins" as the name of a
25 football team?

1 MR. LINDSAY: Objection.

2 THE WITNESS: Well, that was one of the
3 issues.

4 BY MR. REINER:

5 Q You were aware of that at the time, that that is the
6 issue in this litigation, is that correct?

7 MR. LINDSAY: Objection. Argumentative and
8 incorrect.

9 THE WITNESS: I don't think that's an
10 accurate characterization of what I thought. I knew
11 what the litigation issue was, but as to how the
12 arguments would be made based upon my survey, as to
13 the inference that would be made with respect to
14 "Washington Redskins," I understood that to be a
15 separate issue.

16 BY MR. REINER:

17 Q Okay. You are aware, you testified, of the meaning of
18 the words "secondary meaning" in trademark litigation,
19 is that correct?

20 A Yes, generally.

21 Q What do the words "secondary meaning" connote to you
22 --

23 MR. LINDSAY: Objection.

24 BY MR. REINER:

25 Q -- in trademark litigation?

1 MR. LINDSAY: Objection.

2 THE WITNESS: Generally, the term
3 "secondary meaning" is a term used to describe the
4 case or the situation where a word or phrase has come
5 to mean something different than what its denotative
6 meaning as a word or phrase might have been at some
7 prior point in time, in the sense that the consumer or
8 some relevant segment of consumers recognize that that
9 word signifies a particular source -- company or
10 organization -- whereas at some prior point in time
11 that word or phrase might not have had that
12 significance.

13 BY MR. REINER:

14 Q At any point in time did you discuss asking questions
15 relating to the perception of the public with respect
16 to the use of the word "redskins" as the name of the
17 Washington Redskins football team?

18 MR. LINDSAY: Objection. That's exactly
19 what this survey has done in my opinion. But if you
20 want to rephrase the question in a way that doesn't
21 assume the answer, that's fine.

22 (Last question read back.)

23 MR. LINDSAY: I stand on the objection.

24 BY MR. REINER:

25 Q You may answer.

1 A Well, as the name, yes. The issue was that we did not
2 present -- I did not measure how people reacted to the
3 words "Washington Redskins," but as to the conclusions
4 that would be drawn, I believe, that there's a
5 connection. But if your question was did I measure
6 "Washington Redskins," the answer is no.

7 Q No. Did you ever discuss with anybody asking
8 questions relating to the public's perception of the
9 use of the word "Redskins" in the team name?

10 MR. LINDSAY: Objection. Same grounds.

11 THE WITNESS: As a part of the team name,
12 yes. I think I explained last time that that was a
13 question that I asked as part of our initial meeting
14 as to what in fact would be appropriate to measure.

15 BY MR. REINER:

16 Q Were you instructed not to measure the use of the word
17 "Redskins" in the name "Washington Redskins" football
18 team as part of your survey?

19 MR. LINDSAY: Objection. Well, I've made
20 my objection, but your questions are assuming the
21 current survey does not relate to the use of the word
22 "Redskin" in the Washington Redskins team name. I'll
23 stand on that objection.

24 THE WITNESS: I think it would incorrect to
25 say that I was instructed not to. It would be more

1 accurate to say that my understanding of what the use
2 was that would be made of my survey with respect to
3 the legal issue or litigation was that measuring the
4 words that I did was the most valid way of shedding
5 light on the issue that the attorneys wanted to have
6 measured.

7 BY MR. REINER:

8 Q In doing trademark work over the years in surveys,
9 when you measure the secondary meaning of a word, do
10 you place it in context at all?

11 MR. LINDSAY: Objection.

12 THE WITNESS: I don't understand.

13 BY MR. REINER:

14 Q All right. For example, you've heard of Apple
15 computers, right?

16 A Yes.

17 Q The word "Apple" is a trademark for a computer?

18 A I think so.

19 Q Do you --

20 A I mean, I don't have a factual basis. I assume so,
21 yes.

22 Q But you're aware of the Apple computer?

23 A Yes.

24 Q All right. That word has a secondary meaning, is that
25 correct?

1 MR. LINDSAY: Objection.

2 THE WITNESS: The word "Apple"?

3 BY MR. REINER:

4 Q As a trademark for the computer.

5 A I believe so.

6 Q Okay. If you were going to do a survey, would you
7 measure what people's perceptions are for the taste of
8 apples as a fruit when trying to ascertain whether
9 there was any secondary meaning in the word "Apple" as
10 a trademark?

11 MR. LINDSAY: Objection. Vague,
12 incomplete, argumentative, form, relevance.

13 THE WITNESS: Did you say taste of apples?

14 BY MR. REINER:

15 Q Yes. The taste of an apple in trying to determine
16 whether there was any secondary meaning for a
17 trademark for a computer. Would you test that?

18 MR. LINDSAY: Same objections.

19 THE WITNESS: I can't imagine why I would
20 want to.

21 BY MR. REINER:

22 Q All of the questions in the survey which you prepared
23 referred to the word "redskins" as denoting Native
24 American Indian persons, is that correct?

25 MR. LINDSAY: Objection.

1 THE WITNESS: Not Native American Indian
2 persons. I mean --

3 BY MR. REINER:

4 Q American Indians?

5 A Yes.

6 Q What's the actual phraseology in the question so the
7 record is clear?

8 A The question is, "Being used to describe an American
9 Indian person."

10 Q Okay. Now, does that in any manner place a context in
11 which the respondent is to consider the use of the
12 word "redskins"?

13 A Yes, it provides its own context.

14 Q And the only context in which it was asked was by
15 reference to an American Indian person, is that
16 correct?

17 MR. LINDSAY: Objection.

18 THE WITNESS: That's the context of the
19 question. That's the only context, yes.

20 BY MR. REINER:

21 Q Wasn't it the context of the entire survey --

22 MR. LINDSAY: Objection.

23 BY MR. REINER:

24 Q -- that the word "redskins" was to be considered only
25 as a word referring to American Indian persons?

1 MR. LINDSAY: Objection.

2 THE WITNESS: In each of the other words,
3 but --

4 BY MR. REINER:

5 Q Were any questions asked which would reflect people's
6 attitude for the use of the word "redskins" in the
7 name of the Washington Redskins football team?

8 MR. LINDSAY: Objection.

9 THE WITNESS: Well, as I understand your
10 question, frankly, I think the answer is probably yes.
11 Because the answers to the questions as to whether a
12 person would or wouldn't react to the word in a way
13 that was offensive is not unreasonably linked to the
14 way that they would react to the word if it were used
15 as part of another trademark.

16 Just like "Apple" for computers could be
17 allegedly of concern to Apple if it were now appearing
18 as Charlie's Apple Computers or something. It's not
19 as though there isn't a connection between the way
20 that the word might be understood as one word and the
21 way that it might be understood as part of something
22 else. I understood your question to mean that.

23 BY MR. REINER:

24 Q Do you have any scientific basis upon which you could
25 testify that the persons that said the word "redskins"

1 was offensive when applied to an American Indian
2 person but also think that that word when used in a
3 football team for 60 years is also the same?

4 MR. LINDSAY: I'm sorry. Are you finished
5 with the question?

6 MR. REINER: Yes, I am.

7 MR. LINDSAY: I object to the question in
8 that it assumes that the current survey does not
9 supply that basis, and I otherwise object to the form
10 of the question.

11 (Last question and read back.)

12 THE WITNESS: I think that it would be
13 likely that there would be a connection, but there's
14 no way to know empirically what percentage or what
15 number of people would have the same reaction to the
16 name as applied to the team.

17 BY MR. REINER:

18 Q That question could have been asked by you in the
19 survey readily, couldn't it have?

20 MR. LINDSAY: Objection.

21 THE WITNESS: If I considered it to be
22 appropriate. But I didn't, based upon my
23 understanding of what the attorneys thought was
24 important for them to measure in this lawsuit.

25 BY MR. REINER:

1 Q At any time did you discuss with anyone the fact that
2 there may be different results if you asked
3 respondents their reaction to the word "Redskins" in
4 the name "Washington Redskins" rather than having the
5 word restricted for a reference to American Indians?

6 MR. LINDSAY: Objection.

7 THE WITNESS: No.

8 BY MR. REINER:

9 Q No discussion with anybody?

10 A Not in response to your question, no.

11 Q Did you have any discussions with anyone about a
12 hypothesis on the reaction of people to the use of the
13 word "Redskins" in the name "Washington Redskins"
14 rather than asking them their reaction to the use of
15 the word "redskins" in reference to a person?

16 A No.

17 MR. LINDSAY: Objection.

18 BY MR. REINER:

19 Q Did you ever have your own hypothesis of what the
20 likely reaction would be?

21 MR. LINDSAY: Objection.

22 THE WITNESS: If the word would have been
23 substituted in the survey along with other football
24 team names?

25 BY MR. REINER:

1 Q No, no. If the hypothesis was that you would get
2 different results if you asked what people's reactions
3 were to the use of the word "Redskins" only as a
4 reference to a football team.

5 MR. LINDSAY: Objection. It is an
6 incomplete hypothetical. It doesn't state the nature
7 of the survey that would be conducted or the types of
8 questions that would be asked. And as I understand
9 it, it's asking the witness to -- well, I'll stand on
10 those objections.

11 THE WITNESS: My own private opinion about
12 what I thought -- whether I thought that there would
13 be a difference? Oh, sure, I would have an opinion.
14 I do on most things.

15 BY MR. REINER:

16 Q Did you have an opinion that you would get a
17 substantially lesser number of people that would be
18 offended if the term were limited to consideration of
19 whether it was a part of a football team name rather
20 than as a reference to individual persons?

21 MR. LINDSAY: Objection. Form, relevance
22 and foundation, since the witness has testified that
23 he did not conduct a survey of the sort that
24 apparently your question is calling for.

25 (Last question and objection read back.)

1 THE WITNESS: I don't think the word
2 significantly or substantially -- I'm not sure which
3 word you used -- would be my expectation. I think
4 that it largely would depend upon how you asked the
5 question, in the sense that if you're going to try to
6 find out whether people react in an offensive way or
7 an offended way to the term "Washington Redskins," in
8 asking that kind of question, you're more reasonably
9 evoking the connection between "redskins" as a Native
10 American term than the name as it appears in a team.
11 That might just put us back to where we were in the
12 survey.

13 Now, there are other ways that you might
14 ask the question. So, it really depends upon the
15 question that you would ask. Depending upon how that
16 question were asked, I would have an opinion about
17 what the likely response, you know, would be.

18 BY MR. REINER:

19 Q Were there any respondents that indicated that the use
20 of the word "redskins" that applied or referred only
21 to American Indians had to be considered in the
22 context?

23 MR. LINDSAY: Objection.

24 THE WITNESS: Or words to that effect.
25 Some mentioned the words "depending upon the context,"

1 or implied that in their answer.

2 BY MR. REINER:

3 Q And were those persons included as those in the data
4 which you had tabulated as persons believing that
5 "redskins" was offensive?

6 A If they said that it were offensive either to
7 themselves or to others they would been counted.

8 Q So that if a person, for example, on page six,
9 respondent 1110009, question No. 12, said, "depending
10 on the context possibly," isn't that correct?

11 MR. LINDSAY: Would you give us a chance to
12 get to the page?

13 THE WITNESS: Which tab was that? Is that
14 Tab 9 or Tab 10?

15 BY MR. REINER:

16 Q I cannot specifically tell you, but it was for
17 Question No. 12.

18 MR. LINDSAY: What was the respondent
19 number?

20 BY MR. REINER:

21 Q The respondent number was was 1110009.

22 A Nine was the last digit?

23 Q Yes.

24 A Question 12 said, "depending on the context possibly."

25 Q So that person nevertheless was included as finding

1 the word offensive even though they qualified it?

2 MR. LINDSAY: Objection.

3 THE WITNESS: They didn't qualify it.

4 You're interpreting it as a qualification. They said
5 they were offended, and then asked, "Why do you say
6 that?" they gave that response. That would be
7 ridiculous as an interpretation. That would be like
8 saying, "Would you be offended?" and the person said,
9 "I just feel that way," and you're going to reject
10 that because he didn't say -- you know, you're
11 interpreting a connection. The person's simply
12 answering the follow-up "why" question.

13 BY MR. REINER:

14 Q And the words "depending on the context" have no
15 significance to you as a researcher and a marketing
16 psychologist then?

17 A Absolutely it does, and it does precisely in the way
18 that I suggested. That the person is telling you that
19 context is important. And that's maybe why they were
20 offended or that they would be offended. You wouldn't
21 exclude that on the grounds that they said they might
22 be offended on the basis of how they understood it.

23 Q And if that person understood it to refer to the
24 football team playing in Washington, D.C., would that
25 have any meaning to you?

1 MR. LINDSAY: Objection. Foundation.
2 Speculation.

3 THE WITNESS: As to what?

4 BY MR. REINER:

5 Q As to whether or not that person thought in that
6 context it was not offensive.

7 MR. LINDSAY: Same objection.

8 THE WITNESS: If they had said they would
9 be offended if it were used in the name of a team?

10 BY MR. REINER:

11 Q No. On the contrary.

12 A That they wouldn't be offended?

13 Q They would not be offended.

14 A That would be their answer. They would not be
15 offended if they used it as part of a team.

16 Q But that was never asked of them, is that correct?

17 MR. LINDSAY: Objection.

18 THE WITNESS: That question was not asked.

19 BY MR. REINER:

20 Q Now, the name of the Washington Redskins has been in
21 existence for in excess of 60 years, is that correct?

22 MR. LINDSAY: Objection.

23 THE WITNESS: I believe so, yes.

24 BY MR. REINER:

25 Q And you were asked questions about what advice you

1 would give to someone if they were going to be
2 adopting a trademark, is that correct?

3 A I'm not sure whether that was the qualification. If
4 that was the question, I would certainly give that
5 answer.

6 Q Well, we can have it read back, but you do give advice
7 to companies concerning the words that may or may not
8 be adopted as a trademark, is that correct?

9 A Right. But I understood it more broadly to mean that
10 it could already be part of their name. Some words
11 come and go, you know.

12 Q Have you ever advised anybody that had a trademark for
13 more than 60 years, that as a result of current
14 research you would have them change that mark?

15 MR. LINDSAY: Objection. Assumes facts not
16 only not in evidence, but actually contrary to the
17 dates of the registrations.

18 THE WITNESS: Unless I'm misunderstanding
19 your question, typically the primary purpose in doing
20 surveys about consumers' perceptions of trademarks is
21 to make recommendations to the company about whether
22 the mark continues to signify the kind of thing that
23 the company wants to signify. And so, yes, the answer
24 is -- and many of those companies, like Economics
25 Laboratories here in Minnesota, for example, for that

1 precise reason. And I don't know how many years they
2 have used "Economic Laboratories," but it was the
3 purpose of the research to recommend whether that name
4 was appropriate or not.

5 BY MR. REINER:

6 Q And in terms of the research that you do in the
7 surveys, that only concerns attitudes toward the
8 persons who are respondents, is that correct?

9 MR. LINDSAY: Objection.

10 THE WITNESS: By definition, yes.

11 BY MR. REINER:

12 Q And it does not reflect attitudes that they may have
13 had 30 years earlier?

14 MR. LINDSAY: Objection.

15 THE WITNESS: Not necessarily, but
16 depending upon the context, you might expect a
17 relationship.

18 BY MR. REINER:

19 Q Now, with respect to the respondents in this survey,
20 you testified that there were two different groups.
21 One was the general population and one was the persons
22 that were in some manner self-identified as American
23 Indian, is that correct?

24 MR. LINDSAY: Objection.

25 THE WITNESS: In some manner? They were

1 asked whether they were and they said yes. So, in
2 that manner, yes.

3 BY MR. REINER:

4 Q Fine. Now, you talked in terms of the stratification.
5 Is that the word you used to select the manner in
6 which the respondents would be located? Is that what
7 I understand?

8 A Stratification and quota.

9 MR. LINDSAY: Counsel, are you now talking
10 about just the Native American sample?

11 MR. REINER: I'm talking about just the
12 Native American sample.

13 BY MR. REINER:

14 Q Now, you also testified that you did use maps to
15 ascertain whether or not certain telephone references
16 were in a rural or an urban area, is that correct?

17 MR. LINDSAY: Objection.

18 THE WITNESS: That is correct, among other
19 ways. You can determine rural or urban by looking at
20 the total population count as given by survey
21 sampling, which we did. But you can also look at a
22 map, which I did.

23 BY MR. REINER:

24 Q And you did look at a map?

25 A Yes.

1 Q All right. Did you make any effort to ascertain the
2 location of Indian reservations throughout the United
3 States by reference to the Bureau of Indian Affairs
4 listing of the Indian reservations?

5 MR. LINDSAY: Objection.

6 THE WITNESS: No.

7 BY MR. REINER:

8 Q Was that available to you?

9 MR. LINDSAY: Objection.

10 THE WITNESS: Could it have been available?

11 BY MR. REINER:

12 Q Yes.

13 A I assume so. I never asked for it.

14 Q Do you know whether or not there are Indian
15 reservations in New York State?

16 MR. LINDSAY: Objection. We covered this
17 area at the prior deposition.

18 MR. REINER: It's a foundation question.

19 THE WITNESS: I believe so.

20 BY MR. REINER:

21 Q All right. And you could have looked at maps to
22 ascertain where those Indian reservations are located,
23 is that correct?

24 MR. LINDSAY: Objection.

25 THE WITNESS: I wouldn't have had to do

1 that, but one could have looked at maps.

2 BY MR. REINER:

3 Q And you could locate the counties in which they're
4 located, is that correct?

5 A Yes, you could.

6 Q Do you have any information at all as to whether the
7 views expressed by one Indian tribe reflects the views
8 of another Indian tribe?

9 MR. LINDSAY: Objection.

10 THE WITNESS: Do you mean as an empirical
11 fact?

12 BY MR. REINER:

13 Q Yes.

14 A Like a reformed Jew as compared to a conservative Jew?

15 Q Right.

16 A I don't as an empirical fact. It would be reasonable
17 that where a term is used to characterize the people,
18 the ethnic group, that whatever variation there might
19 be might be relatively trivial.

20 Q Are you aware that there are Indian reservations in
21 more than 12 states in the United States?

22 MR. LINDSAY: Objection.

23 THE WITNESS: I don't know the actual
24 number of states in which there are reservations. I
25 would assume so, but I don't really know.

1 BY MR. REINER:

2 Q And --

3 A I know that most of the Indians don't live on Indian
4 reservations. I mean, that would hardly be a starting
5 place for any kind of sampling.

6 Q Are you aware of the registrar of persons who have
7 been enrolled as members of Indian tribes?

8 A Registry?

9 Q Registry.

10 A I believe that there is a registry maintained by BIA
11 or some other entity.

12 Q Was any effort made on your part to ascertain by a
13 random sampling persons to be included in a survey
14 taken from such a list?

15 MR. LINDSAY: Objection.

16 THE WITNESS: I remember a discussion of
17 whether that might be available. My understanding was
18 that it was not, and that BIA, or whatever entity it
19 was that possessed such a list, would not make such a
20 list available for that purpose.

21 BY MR. REINER:

22 Q Did you communicate with any Native American Indian
23 tribal group as to whether or not they had lists of
24 their members?

25 MR. LINDSAY: Objection.

1 THE WITNESS: Not directly, but a
2 discussion of that possibility did occur at my meeting
3 with the attorneys involved.

4 BY MR. REINER:

5 Q And what was that discussion?

6 A As I say, my recollection from a meeting very early on
7 was that in talking about sampling frames, that a
8 listing of registered members of tribes in the United
9 States may exist, but that it would not be available
10 to us to use; that the government would not give those
11 numbers away for use. It was confidential or whatever
12 else. It wasn't available. It was certainly
13 something I thought about.

14 Q Are the Indian tribes themselves listed in some type
15 of a public document that is available?

16 MR. LINDSAY: Objection.

17 THE WITNESS: The names of the tribes?

18 BY MR. REINER:

19 Q Yes.

20 A I believe so, yes. Because I had that as a guide when
21 I was classifying the respondents' answers to their
22 tribal --

23 Q Did you have any indication of where the addresses of
24 those tribes were?

25 A The document I think gave a mailing address or P.O.

1 Box number wherever it mentioned a tribe. I believe
2 so, yes.

3 Q Was any effort made on your part to randomly telephone
4 persons within the telephone area where that
5 particular tribe's address was?

6 MR. LINDSAY: Objection.

7 THE WITNESS: Oh, I didn't. And I wouldn't
8 ever recommend that.

9 BY MR. REINER:

10 Q Okay. Now, you wound up locating persons in
11 approximately two percent of the counties of the
12 United States, is that correct?

13 A I didn't make the calculation, so I don't know any
14 more about that than the last time you asked the
15 question.

16 Q All right.

17 A I didn't select the sample on that basis. If they
18 were anchovy eaters, we would have ended up with less
19 than .2 percent. But that's hardly a relevant issue,
20 it seems it me.

21 Q Is it a relevant issue that you did not even attempt
22 to ascertain whether or not respondents were available
23 on reservations in New England?

24 MR. LINDSAY: Objection.

25 THE WITNESS: It had absolutely nothing to

1 do with the quality of my sampling plan. You start
2 out with the universe, that of the largest 20 states
3 as the appendix tab describes, where most of the
4 Native American population resides outside of Alaska
5 and Hawaii in the United States. It was from there at
6 that point on that sampling procedures were used to
7 get to the rural and urban sample, as discussed at Tab
8 3.

9 BY MR. REINER:

10 Q And no effort was made to ascertain whether or not
11 that sample would produce members of tribes other than
12 those located in the specific areas of those 12
13 states, is that correct?

14 MR. LINDSAY: Objection.

15 THE WITNESS: No effort was made to
16 determine whether that sampling procedure would have
17 produced tribes that didn't live --

18 BY MR. REINER:

19 Q Yes.

20 A If a tribe did not have a member which lived in any of
21 the states, counties, census tracts by definition,
22 they couldn't have had an opportunity to be in the
23 sample.

24 Q Okay.

25 A If one or more did live within that domain, they did

1 have an opportunity.

2 Q Now, with respect to the persons who were included as
3 respondents and who were not members of a tribe, was
4 any effort made to ascertain what criteria they used
5 to self-identify themselves?

6 (Last question read back.)

7 THE WITNESS: No.

8 MR. LINDSAY: First of all, for clarity,
9 Counsel, I assume you're still talking about the
10 Native American sampling?

11 MR. REINER: Yes, until I change.

12 MR. LINDSAY: I object to the question.

13 BY MR. REINER:

14 Q In your work in trademark litigation, have you ever
15 used a stratification process which resulted in
16 respondents living only in two percent of the counties
17 of the United States as a basis to form an opinion as
18 to what the general population of the United States
19 would view?

20 MR. LINDSAY: Objection.

21 THE WITNESS: Almost always, Mr. Reiner,
22 including the work I did for you in false advertising.
23 You end up with a set of malls. They're in five,
24 eight or ten counties by definition. And that would
25 constitute even fewer, and we still project in

1 quantification terms to the population of the United
2 States. Unlike this survey, which was at least a
3 probability sample and which is more precisely used as
4 a basis for making that projection.

5 BY MR. REINER:

6 Q With respect to use of malls, are there any regions in
7 the United States that are divided like into four or
8 eight or more regions of the United States for
9 purposes of selecting malls?

10 A The U.S. Census Bureau characterizes regions of the
11 United States into four, eight, eleven and numerous
12 other gradations, depending upon the specificity with
13 which you want to make groupings.

14 Q And when you are doing a study for malls, is any
15 effort made to select malls located within those
16 particular groupings?

17 MR. LINDSAY: Objection.

18 THE WITNESS: Sometimes. It depends upon
19 what you're trying to do. With general population,
20 frequently you would have geographic diversity.

21 BY MR. REINER:

22 Q And by getting geographic diversity, malls are
23 selected within each of those areas, is that correct?

24 A For the general population survey, but now we're
25 talking about the Native American, I believe, and that

1 would not be an analogous situation at all.

2 Q Now, with respect to trying to ascertain people from a
3 Native American mall study, would any effort be made
4 to try to locate malls in the proximity of Indian
5 reservations to obtain respondents who might be of
6 Native American Indian ancestry?

7 A No. It would be precisely the way that we've done it
8 here -- identify the most populace parts of the
9 country in which Native Americans reside, draw malls
10 proportionate to that population. Obviously you can't
11 have 300 malls. I mean, you can only have a dozen.
12 So you pick the malls that are in proximity to the
13 greatest percentage of the population, which is what
14 we did analogously in this survey.

15 Q And so you consider, then, that the methods used in
16 selecting malls in various groups, whether they're
17 eight or 11 or 12, is analogous to what you did here
18 to get telephone numbers of people who might or might
19 not be Native American Indian persons?

20 A Well, I didn't use the mall example for the analogy of
21 a methodology, but for the analogy of how you would go
22 about selecting malls to represent fairly the
23 characteristics of the subpopulation in which you were
24 interested. Hispanic-speaking people, for example,
25 you would not go to every county in the U.S. where

1 there are Hispanics. You would go to malls in
2 locations which represented where most Hispanics
3 lived.

4 And that would end up, I am sure, with the
5 sample that would be disproportionately southwestern
6 and in the New York and in the Miami area. That
7 doesn't mean that you're not fairly representing the
8 opinions of Hispanics living in Oregon. It just means
9 that they were not in the sampling frame.

10 Q In this particular instance, was any effort made to
11 ascertain where Native Americans would be living in
12 areas outside of the 12 states which you selected?

13 MR. LINDSAY: Objection.

14 THE WITNESS: There were 20 states.

15 BY MR. REINER:

16 Q There were 12 states, weren't there?

17 A There were 20 states that were identified as the most
18 populace Native American states. That's described in
19 Tab 3.

20 Q I understand that.

21 A The next stratification procedure was that we ended up
22 with looking at census tracks and at counties in which
23 there were percentages -- the top 100, I think it was
24 -- of Native American people living in those areas.
25 And that set of top 100 census tracks and set of top

1 100 counties represented 12 in one case and 13 in
2 another case of the states. That's why the resultant
3 sample only came from 12 states.

4 Q With respect to the respondents that you did locate,
5 you used a method called "the next birthday method"
6 when telephoning a person, is that correct?

7 A Yes.

8 Q And in the instructions given to the interviewer, was
9 the next birthday designation used for the person who
10 was present in the household at the time that the call
11 was made?

12 A Yes.

13 Q So that if a call was made to a person who was not
14 present physically when the call was made, that person
15 would not be included as a respondent, is that
16 correct?

17 MR. LINDSAY: Objection.

18 THE WITNESS: I think sort of. If the
19 person whose birthday was next was not in the
20 household at the time the call was made, then that
21 person would not have been in the sample.

22 BY MR. REINER:

23 Q And is there any way that you can ascertain whether or
24 not the person answering the phone understood it to
25 mean the person present in the household at that point

1 in time was whose birthday came next?

2 MR. LINDSAY: Objection.

3 THE WITNESS: There's no way that I could
4 look at the question, nor was it intended to be
5 understood, as to 'who is the next person in the
6 household to have a birthday' and/or whether it meant
7 'and is that person at home?' It was only my concern to
8 have a random procedure by which the respondent could
9 be got if there was more than one person in the home.
10 That was the effect -- that was the purpose of the
11 next birthday technique.

12 BY MR. REINER:

13 Q But you have no indication in the data which you
14 assembled that the respondent who answered the phone
15 understood that it was to be the person with the next
16 birthday who was physically present in the household
17 at the time?

18 MR. LINDSAY: Objection.

19 THE WITNESS: There'd be no way to know
20 what that --

21 BY MR. REINER:

22 Q So, as far as you know, all or part of all of the
23 respondents could have understood the question to mean
24 that it was persons present in the household at that
25 point in time when the call was made whose birthday

1 came next?

2 MR. LINDSAY: Objection.

3 THE WITNESS: I don't know how many.

4 Certainly many might have, and then certainly many
5 might have chosen the --

6 BY MR. REINER:

7 Q And that would affect the randomization technique for
8 actually getting a sample, isn't that correct?

9 A No. I reemphasize again, Mr. Reiner, that this was a
10 method to get to a random person in the household. If
11 that person -- if a respondent thought that the
12 question meant that that applied to whoever was in the
13 household, whether or not that person was there, then
14 they would have said the person isn't there and then
15 the interviewer is instructed to say, "If not home,
16 ask to speak to the person whose birthday would be
17 next." If that person isn't home, how about next?
18 "Well, that person's home and that's me." You end up
19 with the same person. It doesn't make any difference.

20 Q But that's the instruction?

21 A It says so. If not home, ask. "May I please speak to
22 the person whose birthday would be next?"

23 Q Is that the traditional manner in which the next
24 birthday methodology is used?

25 MR. LINDSAY: Objection.

1 THE WITNESS: I certainly have used it that
2 way. I've used it in other ways that are more complex
3 when there's a reason for doing it that way. But I've
4 used it this way.

5 BY MR. REINER:

6 Q And in terms of using it in court proceedings when you
7 wish to get a random sample and a respondent is not
8 available at the time, do you ever have callback
9 procedures?

10 A Sometimes.

11 Q And is that not the preferred method of selecting a
12 sample using a telephone?

13 A It would be a better method from the point of view of
14 statistical projectability. It would not be a
15 required method. And I've used a method quite like
16 this that has been relied upon in courts for
17 projecting from a telephone survey to the American
18 population, and it has not been done with callback
19 procedures.

20 Q And the --

21 A And I might point out, Mr. Reiner, so there's no
22 confusion, in the typical case where you might have a
23 callback procedure and you only have, say, three
24 callbacks, someone else can say, "Well, if you had
25 eight callbacks, wouldn't it have been better?" And

1 the answer is yes, it would have been. So it's a
2 continuum.

3 Q So it's a --

4 MR. LINDSAY: Excuse me, Mr. Reiner.

5 Before you ask your next question, the record should
6 reflect that during the prior answer when the witness
7 was saying this, he was gesturing to Ross Exhibit 1.

8 BY MR. REINER:

9 Q Okay. Now, with respect to statistically projectable
10 surveys, is there a discipline which requires that the
11 person who is designated as the respondent actually be
12 the respondent?

13 MR. LINDSAY: Objection.

14 THE WITNESS: There was no person
15 designated as a respondent, so your question doesn't
16 have a meaning in the context of the survey.

17 BY MR. REINER:

18 Q Was there any stratification on male or female as part
19 of the respondents selected by this telephone survey
20 when inquiring the person's next birthday?

21 MR. LINDSAY: Again, are we still in the
22 Native American sample?

23 MR. REINER: Yes.

24 THE WITNESS: I can't honestly remember
25 right now at the moment. I don't know whether I can

1 find out whether a quota was put -- I honestly don't
2 remember.

3 BY MR. REINER:

4 Q Would that be true also with the general survey?

5 A As we sit here and speak, I can't remember. I know
6 that it's knowable, but I don't know -- I can't tell
7 you right now what the answer is.

8 Q Okay.

9 A Except that I know if you look at the verbatims, you
10 see men and you see women. But beyond that, I can't
11 tell you precise numbers.

12 Q Now, with respect to Tab 7, Question 3A, the word
13 "offensive" is used in the question, is it not?

14 A "Offended."

15 Q Does the use of a word such as "offended" give a
16 mindset or point of reference to the respondent?

17 MR. LINDSAY: Objection.

18 THE WITNESS: You mean beyond the
19 introduction to the survey which gave a mindset?

20 BY MR. REINER:

21 Q Does that particular question give a mindset to the
22 use of the word "offended"?

23 MR. LINDSAY: Objection.

24 THE WITNESS: Not beyond the mindset
25 created by the prior question.

1 BY MR. REINER:

2 Q Is the mindset that there could be persons offended by
3 the use of the word "redskins"?

4 MR. LINDSAY: Objection.

5 THE WITNESS: There 'could' and there 'might
6 not.' There 'might', there 'might not', and they 'might not'
7 have an opinion.

8 BY MR. REINER:

9 Q By using a word "offended" in that manner suggest that
10 the correct answer might be "yes"?

11 MR. LINDSAY: Objection.

12 THE WITNESS: Well, yes, by definition to
13 mean -- and I'm taking your question to mean whatever
14 word would be there. In other words, "What did you
15 get out of this advertisement?" The use of the words
16 "get out" implies something. It encourages some
17 people who might not otherwise have said something to
18 say something. And what one does is, one has built-in
19 mechanisms within the survey to get at the effect, if
20 any, of that kind of mindset, using your terminology,
21 as we did in this case.

22 BY MR. REINER:

23 Q Would a non-leading question have been, "What do you
24 think of when you hear the word 'redskin'?"

25 A I don't think --

1 MR. LINDSAY: Objection.

2 THE WITNESS: I don't think this is a
3 leading question. Do I have to take that as an
4 assumption to your question?

5 BY MR. REINER:

6 Q I'm asking you if it -- is it a procedure in surveys
7 to ask questions that explore what people's state of
8 mind would be by just asking, "What do you think of
9 when you hear a word?"

10 MR. LINDSAY: Objection.

11 THE WITNESS: You could ask that question.

12 BY MR. REINER:

13 Q That was not done here, though?

14 MR. LINDSAY: Objection.

15 THE WITNESS: Of course not.

16 BY MR. REINER:

17 Q And the word "offended" was used as a reference point
18 in the question, is that not correct?

19 MR. LINDSAY: Objection.

20 THE WITNESS: It is a critical word in the
21 question. It tells the respondent what we want them
22 to respond to, whether or not this is offensive,
23 whether it's not offensive or whether they have no
24 opinion about that.

25 BY MR. REINER:

1 Q Offensive in connection with the designation for an
2 American Indian, is that correct?

3 MR. LINDSAY: Objection.

4 THE WITNESS: For an American Indian
5 person?

6 BY MR. REINER:

7 Q Yes. And that does not explore in any manner what
8 people might think of the word "redskin" apart from a
9 reference to an American Indian person?

10 MR. LINDSAY: Objection. Argumentative.
11 No foundation.

12 THE WITNESS: I've already explained why
13 their answers to that question would connect
14 logically. I'm not sure that we're on the same
15 wavelength. I mentioned the example of Economics Labs
16 as an example. I'm sure it has secondary meaning, but
17 that doesn't mean that the word "economics" in it
18 doesn't have meaning outside of Economics Labs to
19 people, and that for that reason colors their image in
20 attitude towards Economics Labs.

21 So that to say, "Well, you didn't measure
22 Economics Labs, you just mentioned "economics" is a
23 nonsensical question from -- especially to ask of a
24 consumer psychologist as to whether or not there
25 wouldn't be a reasonable basis for inferring a

1 connection in the minds of people when exposed to that
2 word in other contexts.

3 BY MR. REINER:

4 Q What do you think about the word "economics" as used
5 in the words "Economics Labs"? What's your reaction
6 to it?

7 MR. LINDSAY: Objection.

8 THE WITNESS: As opposed to just saying
9 "What do you think of when you think of economics?"

10 BY MR. REINER:

11 Q Yes.

12 A Well, you could ask any question you want. Are you
13 asking what I would recommend doing in a design? Then
14 let's talk about that for that particular purpose.

15 Q With respect to the use of the word "bucks," you
16 selected that as a reference in this survey to Native
17 American Indian persons, is that right?

18 MR. LINDSAY: Excuse me, Counsel. You said
19 "bucks."

20 MR. REINER: I mean "bucks." I'm
21 switching.

22 BY MR. REINER:

23 Q In this survey, you tested the use of the word
24 "bucks," is that correct? Or "buck" rather. Pardon
25 me. B-U-C-K.

1 A It was a word that was identified as being a word that
2 has been used to characterize, to identify, to refer
3 to Native Americans historically, as the other terms.

4 Q Have you ever heard of the term "buck" as applied to
5 the Tampa Bay Buccaneers?

6 A Yes.

7 Q All right. Were these people in any manner asked
8 whether or not they thought that the word "buck" as
9 applied to a football team was offensive?

10 MR. LINDSAY: Objection.

11 THE WITNESS: They were not asked that
12 question directly, no.

13 BY MR. REINER:

14 Q From that question and the responses, would you be
15 able to testify that the respondents in this survey
16 thought that the use of the word "bucks" as the name
17 of the Buccaneers in Tampa Bay was offensive?

18 MR. LINDSAY: Objection.

19 THE WITNESS: Only to the same extent and
20 limitations that I've suggested and I've stated in my
21 report -- that I would draw conclusions with reference
22 to an inference that might be made about "redskins,"
23 but not beyond that.

24 BY MR. REINER:

25 Q Would you make any conclusion with respect to the use

1 of the word "bucks" as referring to an American Indian
2 as opposed to the Buccaneers team?

3 MR. LINDSAY: Objection.

4 THE WITNESS: I'm sorry. I don't
5 understand that question.

6 BY MR. REINER:

7 Q All right. From this survey, can you make any logical
8 connection with the use of the word "buck" in the
9 questionnaire and any reference to the word "bucks" as
10 used as a nickname for the team playing in Tampa Bay?

11 MR. LINDSAY: Objection.

12 THE WITNESS: I think only in the context
13 of the general connection that one might make as in
14 the example of "redskin" and "Washington Redskins"
15 that I've already discussed. It's a little different
16 with "buck." Because I think that a person hearing
17 that word, "buck," is not necessarily imaging a word
18 that would look like the word "buccaneers," which does
19 not contain B-U-C-K in it.

20 When they would hear the word "buck" as it
21 was presented in the survey, explicitly connected with
22 "Native American" or "American Indian," I think that
23 the likelihood of a connection would be somewhat less
24 strong. But except for that, I don't think that
25 there's any difference in the inference process.

1 BY MR. REINER:

2 Q Would there be any connection between the word
3 "buccaneers" in the Tampa Bay team and the word
4 "bucks" for the Tampa Bay team in these questions?

5 MR. LINDSAY: Objection.

6 THE WITNESS: I don't think I understand.
7 Is there any connection between "buccaneer" and
8 "bucks"?

9 BY MR. REINER:

10 Q Any inference that can be drawn between the use of the
11 word "buck" in this survey and "bucks" for the team
12 playing in Tampa Bay.

13 MR. LINDSAY: Objection.

14 THE WITNESS: Well, to the extent that a
15 respondent would carry that association or imagery to
16 their understanding of the Tampa Bay Buccaneers, then
17 the answer is yes. I didn't ask that question
18 directly.

19 BY MR. REINER:

20 Q And can you draw any inference or conclusion with
21 respect to that question?

22 MR. LINDSAY: Objection.

23 THE WITNESS: Only in the context that I
24 previously have been asked and answered that same
25 question about the "redskin" example.

1 BY MR. REINER:

2 Q Is it correct to say in the psychology of marketing
3 that you can project person's views only in the
4 context of the state of mind when they are responding
5 to the question?

6 MR. LINDSAY: Objection.

7 THE WITNESS: Whatever that state of mind
8 might connect to, which of course is the issue here.

9 BY MR. REINER:

10 Q And the connection in your survey is only with respect
11 to a designation for a Native American Indian person,
12 is that correct?

13 MR. LINDSAY: Okay.

14 THE WITNESS: No. The connection is
15 whatever subsequent or related connections a consumer
16 or an American or a Native American might make when
17 hearing that word, whether or not it is a word that is
18 or isn't part of some other list of words or names of
19 organizations or whatever.

20 I said, when answering your question
21 previously, what they would connect to, I mean that
22 the questionnaire measures what it measures on its
23 face. It states questions. It asks. It gets
24 answers. But as to whether or not the state of mind
25 that is carved out by the questionnaire is describing

1 the narrow literal state of mind that the consumer
2 would reasonably extend to by connection or inference
3 association, I disagree. And that's why I said
4 whatever they would connect it with.

5 BY MR. REINER:

6 Q Did you personally review the questionnaires after
7 they were completed?

8 MR. LINDSAY: Objection.

9 THE WITNESS: There were none.

10 BY MR. REINER:

11 Q I mean the verbatims.

12 A Yes.

13 Q You reviewed each and every one of them?

14 A Yes.

15 MR. LINDSAY: Objection.

16 THE WITNESS: Yes.

17 BY MR. REINER:

18 Q And in terms of another example, if you go back to the
19 tabulation again which you referred to before with
20 respect to Question 12 -- it's on page 36, I believe.

21 MR. LINDSAY: On Tab 10?

22 MR. REINER: Where he was before, with a
23 tabulation of the 115 series.

24 THE WITNESS: Page 36, yes.

25 BY MR. REINER:

1 Q Would you take a look at the respondent's response to
2 Question No. 12 by respondent No. 1150030?

3 A Okay.

4 Q Does that person indicate in any manner "depends on
5 how the word redskins is used"?

6 MR. LINDSAY: I'm sorry. In response to
7 Question 12 or 13?

8 MR. REINER: In response to Question 12.

9 THE WITNESS: Their response to "Why do you
10 say that?" is "depends on how it's used."

11 BY MR. REINER:

12 Q And does that indicate to you that if it is used for
13 the name of a high school team on a reservation it may
14 not be considered offensive?

15 MR. LINDSAY: Objection.

16 THE WITNESS: I don't know what that person
17 would say if asked that question. Incidentally, I'm
18 going to make clear so that you're not confused. I
19 did not review -- when I said I reviewed each and
20 every questionnaire, I did not review each and every
21 questionnaire for the purposes of making
22 classifications or tabulations apart from what the
23 closed-in questions conveyed with respect to
24 "offended" or "offensive."

25 My reason for having reviewed the

1 questionnaires had to do with the classification of
2 the tribal name given in the Native American sample
3 specifically. Because of the many various ways in
4 which tribal names were mentioned, I wanted to have
5 uniformity as to how they were classified.

6 It was never my intention to reconsider, if
7 you will, my initial decision rule, which was that the
8 perception of the respondents regarding "offensive"
9 was to be determined by the answer to the closed-in
10 question.

11 BY MR. REINER:

12 Q So this particular respondent has indicated as finding
13 the word "offended" even though that respondent said
14 it depends on how it's used, is that correct?

15 MR. LINDSAY: Objection.

16 THE WITNESS: That's correct.

17 BY MR. REINER:

18 Q If you could just turn to respondent 1100000 --

19 MR. LINDSAY: I'm sorry. What page are we
20 on?

21 MR. REINER: Page one.

22 THE WITNESS: Okay.

23 BY MR. REINER:

24 Q Okay. Question 12, did the respondent qualify in any
25 manner the answer given that the word "redskin" was

1 offensive?

2 THE WITNESS: The person gave an answer to
3 the "why do you say that question?" which was, "If he
4 knew, it was used as an insult."

5 BY MR. REINER:

6 Q And does that in any manner qualify the context in
7 which the person would consider the word "offensive"?

8 MR. LINDSAY: Objection.

9 THE WITNESS: It does in the manner in
10 which that person speaks it. But it did not have
11 anything to do with whether or not they answered
12 Question 12 as to they would be offended.

13 BY MR. REINER:

14 Q That person was included in the tabulations of persons
15 who were offended even though they gave a
16 qualification, is that correct?

17 MR. LINDSAY: Objection. Argumentative.

18 THE WITNESS: Absolutely. And
19 incidentally, to make it clear that you're confused
20 here --

21 BY MR. REINER:

22 Q I'm not confused.

23 A Well, I thought maybe you were, so let me explain.

24 Q No, I'm not.

25 A If a person might have said that they would not be

1 offended had they been asked the follow-up question
2 "Why do you say that?" the person might have said if
3 he knew it was used as an insult.

4 In other words, the decision as to whether
5 they thought it was offensive was that question. The
6 follow-up question was simply to find out what their
7 state of mind was. The issue as to whether or not
8 there were people that weren't counted here who might
9 have given the same answer but said "no" with respect
10 to "offensiveness" is just as apparent as the question
11 you're asking. Neither of them would have been
12 considered with respect to their open-end answer.

13 Q Sitting here now, if that person were asked if it is
14 an insult to use it in the name of the Washington
15 Redskins football team and he said no, that person
16 would still be included as being offended if it's used
17 in the reference to American Indians, isn't that
18 correct?

19 MR. LINDSAY: Objection.

20 THE WITNESS: That person's classification
21 wouldn't change in this survey no matter what they
22 would say in your survey.

23 BY MR. REINER:

24 Q Because you didn't ascertain whether or not they
25 thought that the use of the word "insult" would apply

1 to the use of the team name "the Washington Redskins"?

2 MR. LINDSAY: Objection.

3 BY MR. LINDSAY:

4 Q You can't ascertain that?

5 MR. LINDSAY: Objection.

6 THE WITNESS: I don't know what your
7 questionnaire would have done beyond what I've said.

8 BY MR. REINER:

9 Q Okay. Now, page six, respondent 1110009, the response
10 to Question 12, "depending on the context possibly,"
11 that person may not have considered the word
12 "redskins" offensive as used for the name of the
13 Washington Redskins football team as opposed to a
14 designation for an individual person, isn't that
15 correct?

16 A They might or they might not.

17 BY MR. LINDSAY: Objection.

18 BY MR. LINDSAY:

19 Q But you have them tabulated as being "offensive"?

20 A In this survey, yes.

21 MR. LINDSAY: Objection.

22 BY MR. REINER:

23 Q Now, if you can go to page 29, Respondent 1150011 --

24 MR. LINDSAY: I'm sorry. What page and
25 number?

1 MR. REINER: Page 29, Question 12. It's
2 respondent 1150011.

3 BY MR. REINER:

4 Q That person also qualified the answer as being
5 offensive. "It depends on how it was used," isn't
6 that correct?

7 A If talked down to would be offensive, that's part of
8 the answer, yes.

9 Q No, no, no. The "depends on how it was used."

10 A I'm sorry. That's not the response that I see written
11 here.

12 Q For 0011?

13 A Right. The full answer to Question 12 is, "Depends on
14 how it was used, if talked down to would be
15 offensive."

16 Q Do you have any indication that that person would have
17 thought that the use of the word "redskins" in the
18 Washington Redskins name was offensive?

19 MR. LINDSAY: Objection.

20 THE WITNESS: Not beyond the testimony I
21 have extensively given on the extrapolation or
22 generalization.

23 BY MR. REINER:

24 Q The next respondent would be on page 30, respondent
25 1150016 to answer Question 13. Did that person

1 qualify the answer concerning the use of the word
2 "redskins" as applied to an individual person?

3 MR. LINDSAY: Objection.

4 THE WITNESS: The person gave an answer to
5 the follow-up "why do you say that?" question, which
6 was, "It's a borderline word, depending on how it's
7 used. If someone is trying to pick a fight and uses
8 it, some may take offense."

9 BY MR. REINER:

10 Q And is that in reference only to the use of the word
11 as applied to an American Indian person?

12 MR. LINDSAY: Objection.

13 THE WITNESS: That's the context of the
14 question.

15 BY MR. REINER:

16 Q Is there any indication in here of how that person
17 would have felt if the word used was applied to the
18 name of a football team?

19 MR. LINDSAY: Objection.

20 THE WITNESS: As I've stated, not directly.

21 BY MR. REINER:

22 Q Okay. If you look on page 32 for respondent 1150020
23 in response to Question No. 12, what is the response?

24 A "I don't know. Sometimes it is used in the wrong way,
25 if were meant in a wrong way, I would be. If not, I

1 would not be."

2 Q Is that person included as finding the word
3 "offensive" as applied to American Indian persons?

4 A Yes. Because they said "would be offended" to the
5 prior question.

6 Q Is there any indication from this qualifying response
7 that that person might not be offended by the use of
8 the word "redskins" in the name of the Washington
9 Redskins football team?

10 MR. LINDSAY: Objection.

11 THE WITNESS: There's no direct evidence
12 one way or the other. I mean, a person might not be
13 offended by the term as used in an American Indian
14 context and could be offended if it's used in a team
15 name. There's really no way to make that reverse
16 connection either.

17 BY MR. REINER:

18 Q So the answer is you don't know?

19 A I said not directly.

20 Q Okay. Now, if you'll turn to page -- I'm not sure if
21 I asked this before. I apologize if I did. Will you
22 look at page 36, 1150030, Question 12?

23 A Wait a minute. I'm sorry. I think you're switching
24 -- page 36?

25 Q Page 36.

1 A And the number was what?

2 Q 1150030.

3 A Okay.

4 Q Do you see that?

5 A Yes.

6 Q And that person qualified their response when asked
7 why he said that the word was offensive, is that
8 correct?

9 MR. LINDSAY: Continuing objection to the
10 use of the word "qualifies," since the witness has
11 repeatedly said that's not an appropriate term.

12 BY MR. REINER:

13 Q What's the answer?

14 A The answer is "depends on how it's used." Oh, I'm
15 sorry. Question 12?

16 Q Yes.

17 A "Depends on how it's used." Not Question 13?

18 Q No. Does that indicate that if used in the name of a
19 football team it may not be offensive to this person?

20 MR. LINDSAY: Objection.

21 THE WITNESS: I don't think that the answer
22 to the question you're asking has anything to do with
23 the answer given. Because the way that your question
24 is asked would require that in order for it to
25 directly deal with it, the person would say, "Yes, I'm

1 offended. And I'm also offended in the way that it's
2 used in the Washington Redskins name."

3 BY MR. REINER:

4 Q It doesn't say that, though, does it?

5 A No, it doesn't say that. I agree, Mr. Reiner.

6 Q It just says "depends on how it's used"?

7 A That's what the person says.

8 Q And you don't know whether or not that person would be
9 offended if the reference was to the Washington
10 Redskins?

11 A Not directly, no, one way or the other.

12 Q Okay. Do any of the responses to any of the questions
13 indicate that the persons considered the use of the
14 word "redskins" in a context other than as applied to
15 individual persons?

16 MR. LINDSAY: Objection.

17 THE WITNESS: We don't -- I don't know
18 whether or not an answer such as "depends on the
19 context in which it's used" would exclude the use of
20 the term in other phrasing other than the use of a
21 person. So I guess I don't think that the question is
22 directly answered by my saying there wasn't any
23 evidence of that.

24 BY MR. REINER:

25 Q In your experience in market research, do the names of

1 the professional football teams have strong secondary
2 meaning?

3 MR. LINDSAY: Objection.

4 THE WITNESS: I've never -- I honestly have
5 never seen -- I know I've never conducted any and I
6 don't -- except for Dr. Jacoby in another matter. I
7 don't know whether that was specific to a team. I'm
8 not -- I honestly don't know how strong those names
9 are relative to other brand names or organization
10 names. I would suppose that they are strong, but I
11 really would have no empirical basis for the opinion.

12 BY MR. REINER:

13 Q You do read the newspapers, Doctor?

14 A Yes.

15 Q On a regular basis?

16 A Yes. Not ever the sports page, but I do read the
17 newspapers.

18 Q But there are sports pages included in newspapers in
19 which you read on a regular basis?

20 MR. LINDSAY: Objection.

21 THE WITNESS: I think so.

22 BY MR. REINER:

23 Q In terms of the coverage, are you aware that there is
24 extensive coverage of the games played by the teams in
25 the National Football League?

1 A Yes. I believe so, yes.

2 Q Do you watch television?

3 A Not unless the Vikings are playing, when it comes to
4 professional football.

5 Q You are aware that the Vikings have acquired a strong
6 secondary meaning for their name as a result of
7 appearing on television?

8 MR. LINDSAY: Objection.

9 THE WITNESS: Well, I assume that they have
10 secondary meaning. I couldn't tell you ^{relative to} ~~relatives~~ or
11 something as a result of appearing on television, but
12 I think they are probably a pretty strong team name.

13 BY MR. REINER:

14 Q Would that be true of the Washington Redskins?

15 MR. LINDSAY: Objection.

16 THE WITNESS: I would assume so. Again, I
17 just assume that.

18 BY MR. REINER:

19 Q Now, just a few more questions. When doing a survey,
20 is a response rate significant at all?

21 MR. LINDSAY: Objection.

22 THE WITNESS: It's just never raised.
23 Mainly because whenever we do surveys -- typically
24 when we do intercept surveys, if you calculated the
25 actual response rate as a function of actual contacts

1 made, you'd have less than five percent. And none of
2 the experts, to my knowledge, deal with that issue.
3 Except if there were some reason to be suspicious of
4 the nature of the reasons that drove a low response
5 rate or variations in response rate from one to
6 another part of the country or something like that,
7 that might suggest something wrong with the underlying
8 data.

9 BY MR. REINER:

10 Q In your research you have done for court appearances,
11 what has been the range of the response rate which you
12 have used?

13 A Which I have used?

14 Q Which you have used.

15 A I've never calculated -- I don't have any report
16 that's ever been ^{presented}~~present~~ in which I have represented a
17 calculation of response rate, to my knowledge, in any
18 litigation. However, in cross-examination, there have
19 been calculations made, and it turns out that I've
20 relied, as have other experts, on percentages
21 certainly less than five percent.

22 If you count as the denominator total
23 contacts -- that is, all of those people intercepted
24 -- most of whom waive off at the outset as not being
25 willing to be interviewed. It depends on how you

1 calculate response rate.

2 Q In probability studies which you have done, is the
3 response rate of five percent deemed adequate?

4 MR. LINDSAY: Objection.

5 THE WITNESS: It would depend upon how you
6 calculate response rate. If the numerator to the
7 equation reflects what I would call the recommended
8 definition of response rate, which is a definition
9 provided by the American Association of Public Opinion
10 Research, ^{AAPOR} ~~APOR~~, and as cited in several academic
11 articles, the recommended response rate would be at
12 least 50 percent or higher, depending upon the way in
13 which the data were to be used.

14 But the denominator to that equation would
15 not have total contacts. It would have total
16 eligible. And so again, it depends on how you
17 calculate what goes in the numerator and denominator.

18 BY MR. REINER:

19 Q Okay. Now, with respect to the number of respondents
20 who refused to answer, what was the percentage of the
21 the refusal of those contacted?

22 MR. LINDSAY: Objection.

23 THE WITNESS: In which survey?

24 BY MR. REINER:

25 Q Let's do it with the Native American, please.

- 1 A The Native American urban survey had 372 respondents
2 out of 2,547 contacted who refused to be interviewed.
- 3 Q So that would be a probability of about 35, 38
4 percent, something like that, in that magnitude?
- 5 A It would over 30 and under 40.
- 6 Q Okay.
- 7 A And in the rural sample, the answer would be 560 out
8 of 4,416 contact attempts.
- 9 Q That would also be approximately one third?
- 10 A Something like that.
- 11 Q Okay. So those persons were not included in the
12 response rate? That would be excluded from the
13 response rate, is that correct?
- 14 A Yes. It would be like a waive-off.
- 15 Q Now, the persons who were not qualified as American
16 Indians, how many were there in the rural?
- 17 A One hundred and eighteen. Well, either by -- oh, not
18 being American Indians? In the rural, 717.
- 19 Q And that would be about 45 percent?
- 20 A Forty-five percent? No.
- 21 Q Pardon me. Maybe my math is incorrect. That's 717
22 out of how many?
- 23 A It's 4,416. You know, that would be something around
24 15, 16, 17 percent.
- 25 Q Right. I read the wrong figure that I had. I

- 1 apologize. About 16 percent. Okay. Now, there's
2 another grouping of not qualified respondents, 118.
3 What is that all about? What are those people?
4 A Well, it would at least include age not qualified.
5 That is, who weren't 16. I don't think there was any
6 other -- I'm trying to think if there were any other
7 kind of qualification questions.
8 Q Okay.
9 A It would include at least that, okay? Did you want
10 more? I can't think offhand if there's any other
11 reason.
12 Q Okay. Now, of the number of persons in the rural
13 Native Americans, what percentage of the responses
14 were completed?
15 A The rural sample was composed of 189 respondents.
16 Q Out of how many contacts?
17 A Contacts?
18 Q Yes.
19 A 4,416.
20 Q Okay. And that's a response rate of what?
21 A Well, you can't calculate the response rate from those
22 numbers. You need to have the equation that I've
23 referenced, which I would be happy to fax you if you'd
24 like.
25 Q No, no. That's all right.

1 A It's not one that derives -- it's not one that I can
2 play back from memory. It's got about eight or nine
3 components in the numerator and denominator.

4 Q Would it be down somewhere around the five percent
5 level?

6 MR. LINDSAY: Objection.

7 BY MR. REINER:

8 Q I'm not asking --

9 A I didn't make the calculations, so I don't know what
10 it would be.

11 Q All right.

12 A You would certainly not count answering machine, no
13 answers, busy. It really depends upon other factors.
14 I'd have to do the calculation to tell you.

15 Q All right. Eliminating things such as answering
16 machines and things of that nature, was it somewhere
17 in the neighborhood of 1,600 that were actually
18 communicated with somehow or the other and either
19 refused or not qualified or completed?

20 A Refused?

21 Q Well, yes.

22 A I can't --

23 Q You eliminated, as I understood, answering machines
24 just now.

25 MR. LINDSAY: Objection.

1 THE WITNESS: I didn't eliminate anything.
2 This is simply a report of the disposition of each
3 call. I didn't calculate the response rate.

4 BY MR. REINER:

5 Q Of the calls that were made, how many calls were
6 attempted?

7 A 4,416 as of the time that the quota was achieved of
8 189 for rural. So, for example, you see a callback
9 13. We're still in process, but they were stopped at
10 that point. This is a photograph of what happened at
11 that point in time.

12 Q So that the total sample of the persons who identified
13 themselves as Native American Indians living in a
14 rural area and claimed to have the next birthday, you
15 have 189 respondents, is that correct?

16 A Well, we didn't ask them if they lived in a rural
17 area. This was derived --

18 Q But you ascertained that they lived in a rural area?

19 A We determined on the basis of density, yeah.

20 Q So you had a sample size of 189 persons?

21 A No. We had a resulting sample who completed the
22 interview of 189.

23 Q Yes. That's what my question is. That was the sample
24 for the rural Native Americans?

25 A That was the completed sample.

1 Q Right. And of the completed sample for the urban
2 Native Americans you had 169, is that correct?

3 A Yes.

4 Q Okay. So that the total sample was 358, is that
5 correct, for the rural Native Americans?

6 MR. LINDSAY: Objection.

7 THE WITNESS: The two parts of the
8 population samples ended up to be 358.

9 BY MR. REINER:

10 Q And that was out of approximately 7,000 calls, is that
11 correct?

12 A As the total attempts.

13 Q All right. So that of the total attempts of between
14 six or 7,000, you wind up with 358 respondents, is
15 that correct?

16 A That's what it ended up with, right.

17 Q All right.

18 A But that does not leave you with the calculation of
19 response rate.

20 Q In terms of the number of respondents that actually
21 completed a process, how many were located in just two
22 states?

23 MR. LINDSAY: Objection.

24 THE WITNESS: I have no idea.

25 BY MR. REINER:

1 Q That is available to you, though?

2 A Oh, sure.

3 Q Okay.

4 A You know, how many are in eight or one or whatever.

5 Sure.

6 Q Okay. Was the majority of the respondents in the 358
7 located in just two states?

8 A Could it?

9 Q Was.

10 A I don't know. I didn't make the calculations. I
11 don't care.

12 Q Now, with respect to the persons that identified
13 themselves as being American Indians, is there any
14 indication about what quantum of Indian ancestry they
15 had?

16 MR. LINDSAY: Objection. Foundation and
17 form of question.

18 BY MR. REINER:

19 Q Do you have any data which would indicate whether
20 persons of Mexican ancestry residing in the United
21 States identified themselves as being American
22 Indians?

23 MR. LINDSAY: Objection.

24 THE WITNESS: I have no basis of knowing
25 except by virtue of the tribal name that they gave.

1 BY MR. REINER:

2 Q And those that didn't give a tribal name?

3 A Right. There were 50-some who were not members of a
4 tribe, and your question, I assume, is restricted to
5 those.

6 Q Yes.

7 A Because I know none of the others were "could any of
8 them have been part Mexican or part Apache or
9 whatever." Or are you asking me whether or not I know
10 whether any of them could have been just of Mexican
11 ancestry?

12 Q Yes.

13 A I have no way of knowing what they could have been.

14 (Off the Record.)

15 BY MR. REINER:

16 Q On your direct testimony you testified about the
17 meaning of the word "scandalous," is that correct?

18 A I believe so, yes.

19 Q And you recall that you testified that you did not
20 know what the drafters of the statute meant when they
21 used the word "scandalous"?

22 MR. LINDSAY: Objection.

23 THE WITNESS: I honestly don't remember the
24 precise language. I obviously don't know what was in
25 the minds of the people who framed it. I know I had

1 discussions with counsel about what their
2 understanding was of what that word was intended to
3 mean in the statutes, you know, so that I could fairly
4 pick a way of asking the question which would fairly
5 measure that.

6 BY MR. REINER:

7 Q Did you also have any discussions about the use of the
8 word "immoral"?

9 A As separate from --

10 Q Of "scandalous."

11 A I know that "immoral" appeared in the statutory
12 language, but I don't remember that I picked on it
13 particularly as an additional shade of meaning. It
14 was sort of encompassed, I think, within what I took
15 to be the relevant thing to measure in terms of the
16 meaning.

17 Q Okay. And similarly, the word "disparage" -- strike
18 that. Was your understanding of the word "disparage"
19 as used in the statute as a result of discussions with
20 counsel?

21 MR. LINDSAY: Objection.

22 THE WITNESS: Along with my own reading of
23 Mr. Beaird's article and another article, I think a
24 law review article, that were written on this general
25 issue.

1 BY MR. REINER:

2 Q Do you know what law review that was?

3 A I think I provided you -- I know you received copies
4 of those materials during the first meeting.

5 Q All right. I just want to make sure we're talking
6 about the same thing, that's all. One final question.
7 Do you think that the use of the word "Vikings" for
8 the team which you do follow in the National Football
9 League is disparaging of people of Scandinavian
10 extraction?

11 MR. LINDSAY: Objection.

12 THE WITNESS: It might be. It would be of
13 survey relevance if someone were concerned with
14 testing the proposition.

15 BY MR. REINER:

16 Q Do you have a hypothesis that it is?

17 A A hypothesis?

18 MR. LINDSAY: Objection.

19 THE WITNESS: I mean, if you're asking for
20 an opinion, I will give you a -- is that what you mean
21 by "hypothesis"?

22 BY MR. REINER:

23 Q Well, you used the word before.

24 A No, no. You're the one that keeps using "hypothesis."

25 Q You first used the word "hypothesis."

1 A Okay. Well, whoever. Probably Moses did. But
 2 setting that aside, I would think that my opinion
 3 would be that there would be -- there might be some,
 4 but that the majority of people probably would not
 5 have a reaction to that, even those of Scandinavian
 6 ~~decent~~^{descent}, because of the way in which they would connect
 7 with the connotations they would have with the word
 8 might be very different in terms of being more
 9 positive than negative.

10 MR. REINER: I have no further questions.

11 MR. LINDSAY: Let's take a short break.

12 (Short recess was taken.)

13 BY MR. LINDSAY:

14 Q Dr. Ross, at roughly the beginning of his examination,
 15 Mr. Reiner asked you some questions concerning the
 16 concept of secondary meaning. Do you generally recall
 17 that testimony?

18 A Yes.

19 Q I believe your testimony was to the effect that that
 20 concept means that a word has acquired something
 21 different from the prior denotative meaning of the
 22 word at issue. Is that --

23 A Yes.

24 Q What do you mean by that?

25 MR. REINER: Objection.

1 THE WITNESS: I mean that in addition to
2 whatever other meaning that the word may have had at
3 one point in time now comes to signify additionally
4 something else.

5 BY MR. LINDSAY:

6 Q Does it lose its association with the prior meaning of
7 the word?

8 MR. REINER: Objection.

9 THE WITNESS: Not necessarily. No, not at
10 all.

11 BY MR. LINDSAY:

12 Q Mr. Reiner asked you a series of questions concerning
13 -- well, let me withdraw the preface. Could you
14 please turn to Ross Exhibit 1 on Tab 9?

15 A Okay.

16 Q Specifically at page 78, respondent No. 100032.

17 A Right.

18 Q Do you see Question 10, "Redskin would be offensive to
19 others" as the answer given?

20 A Yes.

21 Q And the follow-on question, the answer is, "It is
22 offensive when you refer to a ball team"?

23 A Yes.

24 Q To give another example, sir, would you please turn to
25 page 11 of that tab, respondent No. 100045?

1 A Okay.

2 Q Do you see Question 10, the answer, "to redskin as
3 would be offensive to others"?

4 A Yes.

5 Q And the follow-on response, "Because they are calling
6 the football team redskin"?

7 A Yes.

8 Q Mr. Reiner asked you some questions of whether the
9 views expressed by one tribe could be compared with
10 the views expressed by another tribe. Do you
11 generally recall that testimony?

12 A Yes.

13 Q Were you in any way asked in your study to determine
14 the views of tribes as opposed to individuals?

15 A No.

16 Q Mr. Reiner asked you some questions concerning the
17 word "buck" and the associations in people's minds
18 when "buck" is used as a shortened form for the word
19 "buccaneers." Do you generally recall that testimony?

20 A Yes.

21 Q Do the Buccaneers have a fight song that includes the
22 phrase "braves on the warpath"?

23 MR. REINER: Objection.

24 THE WITNESS: I don't really know.

25 BY MR. LINDSAY:

1 Q Do the Buccaneers have a team mascot named Chief Z?

2 MR. REINER: Objection.

3 THE WITNESS: I really don't know.

4 BY MR. LINDSAY:

5 Q Is the original denotative meaning of the word
6 "buccaneers" in reference to pirates?

7 A I would assume so, yes.

8 MR. LINDSAY: I have no further questions.

9 BY MR. REINER:

10 Q Other than the two respondents out of the 358 that
11 referred to the use of word "redskins" for a football
12 team, is there any other data that you have that would
13 indicate that any of the other respondents considered
14 the use of the word "redskins" for a football team?

15 MR. LINDSAY: Objection.

16 THE WITNESS: I don't know. I honestly
17 don't know. I didn't tabulate that.

18 MR. REINER: I have no further questions.

19 MR. LINDSAY: We will reserve the right to
20 read and sign. For completeness sake, I will again
21 put on the record here that we have agreed that the
22 prior session of the deposition of Dr. Ross will be
23 treated as if taken during the trial period and may
24 accordingly be used by either party.

25 MR. REINER: Yes, so stipulated. Thank you

1 very much.
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1 COUNTY OF RAMSEY)

2 Be it known that I took the foregoing
3 deposition of IVAN ROSS;

4 That I was then and there a notary public
5 in and for the County of Ramsey, State of
6 Minnesota;

7 That by virtue thereof I was duly
8 authorized to administer an oath;

9 That the witness was by me first duly
10 sworn to testify the truth, the whole truth and
11 nothing but the truth concerning the matter in
12 controversy aforesaid;

13 That the foregoing transcript is a true
14 and correct transcript of my original stenographic
15 notes in said matter;

16 That I am not related to nor an employee
17 of any of the parties hereto, nor a relative nor
18 employee or any attorney or counsel employed by
19 the parties hereto, nor interested in the outcome
20 of the action.

21 WITNESS MY HAND AND SEAL this day of
22 1997.

23 Christopher J. Hagle

24 Notary Public

25

Ray J. Lerschen & Associates